No. 91-372-CSY
Status: GRANTED

Title: Georgia, Petitioner
v.
Thomas McCollum, William Joseph McCollum and Ella Hampton McCollum

Docketed:
September 3, 1991

Court: Supreme Court of Georgia

Counsel for petitioner: Kohler,Harrison W.

Counsel for respondent: Revell Jr.,Robert H., Walters,Jessie W.

Entry	Date	Note	Proceedings and Orders
1	Sep 3 1991	G	Petition for writ of certiorari filed.
3	Sep 27 1991		Brief of respondents Thomas McCollum, et al. in opposition filed.
2	Oct 2 1991		DISTRIBUTED. October 18, 1991
4	Oct 3 1991	X	Reply brief of petitioner Georgia filed.
6	Oct 28 1991		REDISTRIBUTED. November 1, 1991
7	Nov 4 1991		Petition GRANTED.
			**********
12	Dec 17 1991		Joint appendix filed.
13	Dec 17 1991		Brief of petitioner Georgia filed.
11	Dec 18 1991		Brief amicus curiae of Criminal Justice Legal Foundation filed.
8	Dec 19 1991		Brief amicus curiae of United States filed.
10	Dec 19 1991		Brief amicus curiae of NAACP Legal Defense and Educational Fund filed.
16	Dec 19 1991		Brief amicus curiae of Charles J. Hynes filed.
14	Dec 23 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
9	Jan 2 1992		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 26, 1992. (1ST CASE)
15	Jan 21 1992		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
17	Jan 21 1992		Brief of respondents Thomas McCollum, et al. filed.
19	Jan 21 1992	X	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
18	Jan 24 1992		CIRCULATED.
20	Jan 24 1992		Record filed.
		*	Certified record Supreme Court of Georgia (includes Supplemental record on appeal)
21	Jan 28 1992	P	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Jan 31 1992	X	Reply brief of petitioner Georgia filed.
23	Feb 26 1992		ARGUED.

91-372

No. _____

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to review the Georgia Supreme Court's decision that the United States Constitution does not prohibit a white criminal defendant from exercising his peremptory strikes in a racially discriminatory manner?

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In The

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October Term, 1991

STATE OF GEORGIA,

Petitioner,

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THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

Petitioner State of Georgia respectfully prays that a writ of certiorari issue to review the judgment of the Georgia Supreme Court entered on July 12, 1991, and the subsequent denial of the motion for rehearing on July 24, 1991.

OPINIONS BELOW

The Superior Court of Dougherty County, Georgia, on October 22, 1990, denied the State's pretrial motion to prohibit the criminal defendants from exercising their peremptory strikes in a racially discriminatory manner

(Appendix A, App. 1-2). On July 12, 1991, the Georgia Supreme Court, in a 4-3 decision, affirmed and held that a criminal defendant is not prohibited from exercising his peremptory strikes in a racially discriminatory manner (Appendix B, App. 3-14). The Georgia Supreme Court denied the State's motion for rehearing on July 24, 1991 (Appendix C, App. 15).

JURISDICTION

Judgment of the Georgia Supreme Court was entered on July 12, 1991, and rehearing denied July 24, 1991. This Court's jurisdiction to consider this petition from a state criminal direct appeal is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION

Fourteenth Amendment, United States Constitution:

> . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

Respondents Thomas McCollum, William McCollum, and Ella McCollum – who are white – were indicted for several assaultive crimes against the victims, who are black (Appendix A, App. 1). The State filed a pretrial motion, on both state and federal grounds, to prohibit the

McCollums from exercising their peremptory strikes in a racially discriminatory manner (Appendix A, App. 1).

The Dougherty County Superior Court denied the State's motion, but certified the question for immediate review; and the State took an interlocutory appeal (Appendix A, App. 2).

While the case was pending in the Georgia Supreme Court, the State pointed out this Court's intervening decisions in *Powers v. Ohio*, 499 U.S. ___, 111 S.Ct. ___, 113 L.Ed.2d 411 (1991) and *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. ___, 111 S.Ct. ___, 114 L.Ed.2d 660 (1991). The State argued that both the Georgia Constitution and the Fourteenth Amendment to the United States Constitution prohibited a criminal defendant from exercising his peremptory strikes in a racially discriminatory manner.

The Georgia Supreme Court decided the case on federal grounds and held that *Edmondson v. Leesville Concrete Co., Inc.* was not applicable because *Edmondson* was a civil case (Appendix B, App. 3). The Georgia Supreme Court also held that a criminal defendant is not prohibited from exercising his peremptory strikes in a racially discriminatory manner (Appendix B, App. 3).

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A WHITE CRIMINAL DEFENDANT IS PROHIBITED FROM EXERCISING HIS PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that a prosecutor could not exercise his peremptory

strikes in a racially discriminatory manner. This Court did not express an opinion as to whether defense counsel was similarly limited in the exercise of peremptory challenges. *Batson v. Kentucky*, 476 U.S. at 89, n. 12.

Then in *Powers v. Ohio*, 499 U.S. ___, 111 S.Ct. ___, 113 L.Ed.2 411 (1991), this Court held that a criminal defendant, regardless of his race, had standing to challenge a prosecutor's discriminatory exercise of peremptory strikes. The right to be protected was the jurors' equal protection claim not to be excluded from jury service on the basis of race. *Powers v. Ohio*, 113 L.Ed.2d at 428.

Standing to challenge the discriminatory exclusion of jurors was extended to civil litigants in *Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. ___, 111 S.Ct. ___, 114 L.Ed.2d 660 (1991). Discriminatory peremptory challenges violate the equal protection rights of the jurors. *Id.*

> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

Edmondson v. Leesville Concrete Co., Inc., 114 L.Ed.2d at 678.

Just as race discrimination within the courtroom in a civil case undermines the integrity of the judicial process, so does race discrimination in a criminal case. Both the victims and the public at large lose confidence in a judicial system which permits a criminal defendant to be racially discriminatory in the exercise of peremptory strikes.

The State of Georgia believes the Georgia Supreme Court majority opinion is in conflict with *Edmondson*. A juror's equal protection rights are violated if the juror is peremptorily struck for racially discriminatory reasons, regardless of whether the case is civil or criminal. Therefore, this Court should grant a writ of certiorari because the Georgia Supreme Court has decided a federal question in a way that conflicts with the applicable decision of this Court.

If *Edmondson* does not control, then this Court should grant a writ of certiorari to decide an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

For all the previously stated reasons, Petitioner State of Georgia prays that this Court grant a writ of certiorari to review the decision of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX A

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	*	
	*	
V.	*	INDICTMENT
THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,	*	NO. 90 R 816
	*	
	*	
Defendants.	*	
	*	

ORDER

(Filed Oct. 22, 90)

The Defendants, who are white, are charged with several assaultive crimes against the victims, who are black. The State has moved that if, during jury selection, the State makes out a prima facie case that Defendants are exercising their peremptory strikes in a racially discriminatory manner, the Defendants must give a neutral reason for the exercise of each peremptory strike. The State has argued that the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), are applicable to a criminal defendant under both federal and state law.

This Court is aware of no Georgia appellate law on this issue and denies the State's Motion. Neither Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner.

THE STATE'S MOTION IS DENIED.

However, because this issue is one of first impression for the Georgia courts, this order is of such importance to the case that an immediate review should be had.

This 22 day of Oct., 1990.

/s/ Asa D Kelley Jr
ASA D. KELLEY, JR.
Chief Judge
Dougherty Judicial Circuit

APPENDIX B

In the Supreme Court of Georgia

Decided: JUL 12 1991

S91A0310. THE STATE V. McCOLLUM et al.

SMITH, Presiding Justice.

McCollum and others were indicted on several counts as a result of an altercation. The state filed a motion asking that the trial court prohibit the defendants from using peremptory strikes in a racially discriminatory matter. The motion was denied and the state appeals.

1. Since the order of the trial court, the United States Supreme Court has decided the case of *Edmonson v. Leesville Concrete Co., Inc.*, 59 LW 4574, decided June 3, 1991. In that case, the Court held, generally, that the exclusion of any prospective juror by virtue of race would constitute an impermissible injury to that juror. 59 LW 1578.

2. *Edmonson*, of course, was a civil action. While is may be that the United States Supreme Court may, in another case, prohibit a criminal defendant from exercising peremptory challenges to exclude jurors on the basis of race, it has not yet done so. Bearing in mind the long history of jury trials as an essential element of the protection of human rights, this court declines to diminish the free exercise of peremptory strikes by a criminal defendant.

Judgment affirmed. All the Justices concur, except Hunt, Benham, and Fletcher, JJ., who dissent.

S91A0310. THE STATE v. McCOLLUM et al.

HUNT, Justice, dissenting.

I respectfully dissent because the inescapable conclusion from *Edmondson* is that no one, not even a criminal defendant, may exercise peremptory strikes so as to exclude jurors in a racially discriminatory manner. *Edmondson* makes it abundantly clear that the exercise of peremptory strikes by any party in any case, pursuant to a state or federal statute, in a state or federal courtroom, is "state" action. And, under *Edmondson*, when that action excludes jurors on the basis of race it may be challenged by the court, by the opposing party, or even by the juror and remedied.

Edmondson, however, is but the latest pronouncement of the federal courts leading to this result. Surely this result was forecast by *Batson v. Kentucky*, itself.[1] While the *Batson* majority sidestepped the issue: "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel," id., 106 S.Ct. at 119, n.12, the dissenting opinion of Chief Justice Burger reasoned:

> [T]he clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike. Once the court has held that *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not? (Emphasis in original). 106 S.Ct. at 1738. (Burger, C.J., dissenting).

[1] 476 U. S. 79 (106 SC 1712, 90 LE2d 69) (1986).

Moreover, as the 5th Circuit Court of Appeals confirmed in *U. S. v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986):

> [E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited.[2]

The rule of *Batson* has proceeded from enforcing the equal protection rights of black defendants to those of white defendants and to those of jurors whose rights may be enforced by the state as well as the defendant. It has expanded from criminal cases to civil cases and from race to gender. One may legitimately question whether peremptory challenges will survive the enveloping application of the rule. Consider the observation of Judge Charles E. Moylan, Jr., writing for the Court of Special Appeals of Maryland in *Chew v. State*, 527 A2d 332 (Md. App. 1987):

> To hold that, in the jury selection process, the equal protection clause is available only to black defendants deprived of black jurors is philosophically indefensible. Once the protection is moved beyond the narrow base, however, there is no logically defensible way to contain it.

[2] Cognizable group affiliation may not be limited to those of the same race. In *U. S. v. De Gross*, 913 F2d 1417 (9th Cir. 1990), the 9th Circuit Court of Appeals prohibited the *defendant's* peremptory strikes which were based on gender, holding (a) peremptory challenges based on gender violate the jurors' equal protection rights and those rights may be asserted by the government and (b) a criminal defendant's peremptory challenge is state action.

> Between the absolute abolition of the peremptory challenge, on the one hand, and the absolute refusal to look behind the unfettered use of the peremptory challenge, on the other hand, there may be no tenable middle ground.

Chew v. State, supra, id. at 350.

The majority acknowledges the inevitable but prefers to await further instructions from Washington. In the meantime it reveres the defendants' entitlement to racially-motivated peremptory strikes as though it were of constitutional significance. But peremptory strikes, unlike the prohibition against racial discrimination, enjoy no constitutional foundation. Fundamental to *Edmondson* is the notion that racially-motivated strikes are just another form of racial discrimination which deserves no protection in the administration of justice in our courts. If this is true, it defies all logic to say that such strikes are prohibited only when exercised by the state.[3] I would reverse the denial of the state's motion.

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[3] This is the position of Justice Scalia's dissent as to the impact of the *Edmondson* majority opinion which he believes is more harmful than helpful to the minority defendant.

> In criminal cases, *Batson v. Kentucky*, [cit.] already prevents the *prosecutor* from using race-based strikes. The effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the *defendant* from doing so – so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it is ordinarily more difficult to *prove* race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say

(Continued on following page)

S91A0310. THE STATE V. McCOLLUM et al.

BENHAM, Justice, dissenting.

I must respectfully dissent and must write separately to point out how the majority opinion, by refusing to hold that race is an impermissible consideration in determining a person's fitness for jury service, does unmistakably serious harm to the integrity of the jury selection process.

1. The majority opinion fails to take into consideration an almost unbroken chain of United States Supreme Court opinions leading to the abolition of race as a consideration for jury service: *Strauder v. West Virginia*, 100 U.S. 303 (25 LE 664) (1880); *Swain v. Alabama*, 380 U.S. 202 (85 SC 824, 13 LE2d 759) (1965); *Taylor v. Louisiana*, 419 U.S. 522 (95 SC 692, 42 LE2d 690) (1975); *Batson v. Kentucky*, 476 U.S. 79 (106 SC 1712, 90 LE 69) (1986); *Powers v. Ohio*, 499 U.S. ___ (111 SC 1364, ___ LE2d ___) (1991); *Edmonson v. Leesville Concrete Co., Inc.*, 59 LW 4574 (1991). It is evident from these opinions that in the area of jury service, the trend has been one of inclusiveness rather than exclusiveness.

In condemning racial discrimination in the jury selection process, the United States Supreme Court has highlighted not only the harm to the parties, but also the harm done to the jury selection process itself by the exclusion

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(Continued from previous page)

> the Constitution requires. So in criminal cases, today's decision represents a net loss to the minority litigant. (Emphasis in original).

Edmondson, supra, at p. 4582, Justice Scalia, dissenting.

of prospective jurors on the basis of race. Justice Kennedy, writing for the majority in *Powers*, supra at 1368, said that *Batson* "was designed to serve multiple ends." One of those ends must be to allow ordinary citizens to participate in the administration of justice, which Justice Kennedy described as "one of the principal justifications for retaining the jury system." Id. He went on to state the holding in that case:

> the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civil life. [Id. at 1370]

The most recent case applying the principles which are apparent in this trend toward inclusiveness is *Edmonson v. Leesville Concrete Co.*, supra, which prohibited race-conscious jury strikes in civil cases. The focus of the court's reasoning in *Edmonson* is on the harm done to jurors and to the justice system, and the court found that the harm was no less because the discrimination occurred in a civil case. Applying the same reasoning, it is obvious that the harm which racial discrimination in selecting a jury does to the integrity of the jury selection process is just as egregious whether it is done by the state or the defendant in a criminal trial or by the plaintiff or defendant in a civil trial.

2. While I would join Justice Fletcher's dissent to the extent it says *Edmonson* requires racial neutrality in jury selection under the United States Constitution, I would go one step further and also address the issue of

the applicability of our state constitution to racially motivated peremptory strikes.

An important question which was raised in the enumerations of error, and briefed and argued by the parties, but not addressed by the majority opinion, and which needs to be addressed here, is whether Art. I, Sec. I, Par. XI, of the Georgia Constitution, which guarantees every accused a trial by an impartial jury, also protects all citizens from racial discrimination in jury service even to the extent of curtailing a defendant's use of racially-motivated peremptory strikes.

The majority's view fails to take into consideration the dynamic aspect of constitutional jurisprudence. Justice John Marshall put the matter of dynamic versus static jurisprudence in proper perspective in *McCulloch v. Maryland*, 17 U.S. 316, 407-415 (4 LE 579) (1819):

> We must never forget that it is *a constitution* we are expounding . . . a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.

Such a crisis was recognized in *Batson v. Kentucky*, supra, when the United States Supreme Court, considering the use of peremptory strikes by the state, employed the Equal Protection Clause of the U.S. Constitution to forbid the use of racially-motivated strikes by the state, and put in place a legal mechanism for preventing future abuse.

Recognizing the literal correctness of the majority's statement that the U.S. Supreme Court has not yet held that defendants in criminal cases are limited to race-neutral exercises of peremptory challenges, I believe it is incumbent on the highest appellate court in this state, in

the exercise of our duty to defend and protect the integrity of the judicial process and, as a necessary part of it, the jury selection process, to look to our state constitution for the appropriate means of achieving that laudable goal. While state courts cannot afford less protection under the state constitution than is required under the United States Constitution, there is no prohibition against the states providing their citizens more protection under the state constitution than is provided under the federal constitution. *Creamer v. State*, 229 Ga. 511 (3) (192 SE2d 350) (1972). The authority to grant that protection in this case is found in Art. I, Sec. I, Par. XI, of our state constitution:

> The right to trial by jury shall remain inviolate . . . In criminal cases, the defendant shall have a public and speedy trial by an impartial jury . . .

The language of that constitutional provision does not lodge exclusively with the defendant the right to trial by jury. Since the right to a jury trial includes the right to a jury drawn from a fair cross-section of the community (*Taylor v. Louisiana*, 419 U.S. 522 (95 SC 692, 42 LE2d 690) (1975)), then the right to fair and impartial jury selection belongs to the community as well as the defendant.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [*Batson*, supra at 107]
>
> The injury [from discriminatory jury selection] is not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and the democratic ideal reflected in the process of our courts. [*Ballard v. United States*, 329 U.S. 187, 195 (67 SC 261, 91 LE2d 181) (1946)]

Having both the duty and the authority to do so, we must declare it to be offensive to the Constitution of the State of Georgia for any party in a criminal proceeding to use race as a factor in determining a person's fitness for jury service.

3. Whether considered under the Georgia Constitution or under the U.S. Constitution as applied in *Edmonson*, the majority's conclusion that the right of a defendant in a criminal action to use peremptory strikes outweighs the right of prospective jurors to be considered for participation in the judicial system without consideration of race, is untenable. The unfettered exercise of peremptory challenges by either the defendant or the State to strike members of cognizable groups destroys the right to a jury drawn from a representative cross-section of the community. Peremptory challenges are not constitutionally protected fundamental rights – they are but one statutory tool in the effort to reach the constitutional goal of a fair and impartial jury.[1] While OCGA § 15-12-165 itself places no restrictions on the right to peremptory challenges, this court has recognized that the right is not without limits: in *Gamble v. State*, 257 Ga. 325 (357 SE2d 792) (1987), this court adopted the reasoning of *Batson* and imposed a restriction of racial neutrality on the state in criminal cases. Although we have in the past given criminal defendants great deference in their use of

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[1] "[T]here is no constitutional obligation to allow [peremptory challenges]." *Edmonson*, supra, 59 LW at 4576.

peremptory strikes, that deferential treatment must be abandoned when it begins to erode the public's confidence in the entire legal process. Racially motivated jury strikes are of such an egregious nature that the jury selection process will suffer irreparable damage if we fail to act.

The public interests in need of protection in this case are the integrity of the jury selection process, the very foundation of the truth-finding process, and the compelling need to encourage citizens to fulfill their citizenship requirements by freely serving on juries without the fear of having racial prejudice visited upon them.

> If the courts allow jurors to be excluded because of group bias, be it at the hands of the State or the defense, they would be willing participants in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it. [*State v. Alvarado*, 221 N.J. Super. 324 (534 A2d 440) (1987)]

Being convinced that the trial court erred in denying the State's motion, I would reverse. Consequently, I must dissent to the judgment of affirmance.

S91A0310. THE STATE v. MCCOLLUM [sic] et al.

FLETCHER, Justice, dissenting.

As the majority notes, while the present case was pending in this court, the United States Supreme Court decided *Edmonson v. Leesville Co., Inc.*, 59 USLW 4574

(U.S. June 3, 1991), reversing and remanding 895 F2d 218 (5th Cir. 1990). *Edmonson* holds that "a private litigant in a civil case may [not] use peremptory challenges to exclude jurors on account of their race. . . . [because] the race-based exclusion violates the equal protection rights of the challenged jurors." *Edmonson*, 59 USLW at 4575.

As I interpret *Edmonson*, the United States Supreme Court has determined that the process of jury selection constitutes state action in that the objective of the selection process is determination of representation on a governmental body and "[t]he fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised." *Edmonson*, 59 USLW at 4577. Accordingly, the restrictions placed upon the exercise of racially based peremptory jury strikes by the equal protection component of the Fifth Amendment's Due Process Clause would appear to apply to all parties in both civil and criminal cases.[1]

Based upon the aforesaid interpretation of the holding in *Edmonson*, I feel compelled to apply that holding to the present case.[2] In so doing, I would find that the trial

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[1] In his dissenting opinion, Justice Scalia points out that the majority decision in *Edmonson* "logically must apply to criminal prosecutions." *Edmonson*, 59 USLW at 4582.

[2] As it seemed apparent that there is no state action involved in an accused's exercise of his or her peremptory strikes, my initial observation concerning this case was more in line with the majority opinion and with Justice O'Connor's

(Continued on following page)

court erred in denying that state's motion to have appellees prohibited from using their peremptory strikes in a racially discriminatory manner and would reverse and remand the case to the trial court.

(Continued from previous page)

dissenting opinion in *Edmonson*, 59 USLW at 4579-4582. However, it now appears that a determination has been made that the rights of a defendant, whether a private litigant or an accused in a criminal trial, are subservient to the rights of prospective jurors who are not on trial and whose life, liberty, and property are not at stake.

APPENDIX C

SUPREME COURT OF GEORGIA

ATLANTA JULY 24, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91A0310

THE STATE V. THOMAS SCOTT MCCOLLUM, ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunt, Benham and Fletcher, JJ., who dissent.

SUPREME COURT OF THE
STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF OF THOMAS McCOLLUM AND OTHER RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to review the Georgia Supreme Court's decision that the Georgia Constitution's guarantee of the right to an impartial trial does not preclude a criminal defendant from using his peremptory strikes in a racially discriminatory manner?

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STATEMENT OF THE CASE

This case is one in which no trial has taken place and thus no jury has been selected.

The McCollums were indicted on August 10, 1990, on several counts as a result of an altercation in their dry cleaning business in Dougherty County, Georgia.

The district attorney of the Dougherty Judicial Circuit disqualified himself, and an attorney was designated acting district attorney thereafter. He in turn disqualified himself, and the Office of the Attorney General of the State of Georgia assumed responsibility for the prosecution of this case.

The attorney general filed a pre-trial motion asking that the trial court prohibit the McCollums from using their peremptory strikes to exclude black jurors. The victims were black and the defendants were white. Elements of racism were injected into the case by virtue of a petition widely circulated throughout the black community (part of the record below, see *Appendix 3*). *Powers v. Ohio*, 499 U.S. ___, ___, 113 L.Ed.2d 411 at 420, 111 S.Ct. 1364, ___ (1991). The attorney general speculated or conjectured that defendants would use their statutory peremptory strikes to excuse all of the black jurors from the jury panel.

The pre-trial motion was denied. The question was certified for appeal. The attorney general made an application to the Georgia Supreme Court for interlocutory appeal, which was unanimously granted on November 15, 1990.

The Georgia Supreme Court, in a 4-3 decision, without elaboration, declined to diminish the free exercise of peremptory strikes by a criminal defendant.

SUMMARY OF ARGUMENT

The Georgia Supreme Court in its grant of interlocutory appeal set forth the limited question of whether the Georgia Constitution's guarantee of the right to an impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner. The opinion of this Court in *Holland v. Illinois*, 493 U.S. ___, 107 L.Ed.2d 905, 110 S.Ct. 803 (1990), is persuasive authority that the Georgia Supreme Court correctly answered this question in the negative.

No issue of a violation of the Equal Protection Clause of the Fourteenth Amendment was claimed in the court below and therefore should not be brought before this Court for consideration by petition for writ of certiorari.

ARGUMENT

1. NEITHER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION NOR ART. 1, § 1, ¶ 11, TO THE GEORGIA CONSTITUTION PROHIBITS THE USE OF PEREMPTORY JURY STRIKES BY A CRIMINAL DEFENDANT IN A RACIALLY DISCRIMINATORY MANNER

The petition for writ of certiorari in this case seeks to have the decision of the Georgia Supreme Court reversed

in order to have the holdings of the cases of *Batson v. Kentucky*, 476 U.S. 79 (1986), *Powers v. Ohio*, 499 U.S. ___, 113 L.Ed.2d 411, 111 S.Ct. 1364 (1991), and *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 114 L.Ed.2d 660, 111 S.Ct. ___ (1991), extended to preclude the McCollums at the trial of this case from the unfettered use of their peremptory strikes if such strikes result in the excusal of black trial jurors based on race.

In granting the application for interlocutory appeal, the Georgia Supreme Court set forth the following limited question to be decided in that appeal:

> Whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner. (See *Appendices 1 and 2*)

The Georgia guarantee of an impartial trial is embodied at Art. 1, § 1, ¶ 11 of the Georgia Constitution: " . . . In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; . . . "

The federal Sixth Amendment right to jury trial is as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . .

The question certified for appeal by the Georgia Supreme Court was thus limited to the application of Art. 1, § 1, ¶ 11 of the Georgia Constitution to constitutionally

preclude a criminal defendant from exercising peremptory strikes in a racially discriminatory manner.

Since the guarantee of an impartial trial under the Georgia Constitution is virtually identical to the same guarantee under the Sixth Amendment to the federal Constitution, the case of *Holland v. Illinois*, 493 U.S. ___, 107 L.Ed.2d 905, 110 S.Ct. 803 (1990), is persuasive authority that the limited question presented to the Georgia Supreme Court has been correctly answered in the negative.

In that case this Court held that the prosecution's use of peremptory strikes against black jurors did not deprive a white defendant of his Sixth Amendment right to an impartial jury. No equal protection claim was made in that case. This Court held as follows:

> " . . . All we hold is that he does not have a valid constitutional challenge based on the 6th Amendment – which no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other general characteristics . . .
>
> Since only the Sixth Amendment claim and not the equal protection claim is at issue, the question before us is not whether the defendant has been unlawfully discriminated against because he was white, or whether the excluded jurors have been unlawfully discriminated against because they were black, but whether the defendant has been denied the right to a trial by an impartial jury." 107 L.Ed.2d at 905.

2. THE LIMITED QUESTION CERTIFIED FOR DECISION BY THE GEORGIA SUPREME COURT WAS WHETHER THE GEORGIA CONSTITUTION'S GUARANTEE OF AN IMPARTIAL TRIAL PRECLUDED THE EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER AND THE DECISION OF SUCH COURT SHOULD NOT BE EXPANDED TO CONSIDER OTHER ISSUES BY GRANT OF WRIT OF CERTIORARI IN THIS CASE

The attorney general neither raised on application for interlocutory appeal nor in brief and argument before the Georgia Supreme Court the question which it *now* seeks to have this court decide on appeal: Whether the application of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution precludes a criminal defendant from the exercise of peremptory strikes in a racially discriminatory manner because such action by the criminal defense attorney constitutes state action and offends the equal protection rights of the excluded jurors. Not until the decision was pending and the attorney general submitted his first and second supplementary briefs was the application of the Equal Protection Clause raised.

The issue which the Georgia Supreme Court had before it in the underlying case, as stated in the application for interlocutory appeal, was based upon a claim of violation of the Georgia Constitution's guarantee to an impartial trial and was not based upon an equal protection claim. This court should not now consider the equal protection claim on appeal when the same was not raised in the court below.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari to review the decision of the Georgia Supreme Court should be denied.

Respectfully submitted,

ROBERT H. REVELL, JR.
Counsel of Record
Attorney for Respondents

JESSE W. WALTERS
Attorney for Respondents

Please Serve:

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APPENDIX

(SEAL)

SUPREME COURT
STATE OF GEORGIA
STATE JUDICIAL BUILDING
Atlanta 30334

HAROLD G. CLARKE, CHIEF JUSTICE
GEORGE T. SMITH, PRESIDING JUSTICE
CHARLES L. WELTNER
RICHARD BELL
WILLIS B. HUNT, JR.
ROBERT BENHAM
NORMAN S. FLETCHER
JUSTICES

JOLINE B. WILLIAMS,
CLERK
WM. SCOTT HENWOOD,
REPORTER

NOV 15 1990

TO ALL COUNSEL:

RE: Application No. S91I0118, State of Georgia v. Thomas McCollum, et al.

The Court today granted this application for interlocutory appeal. All the Justices concur.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

App. 2

The Court is particularly concerned with, and requests that you address in your briefs, the following:

Whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner.

Joline B. Williams, Clerk
BY Lynn M. Hogg

App. 3

"KEEP THE DREAM ALIVE"

Dr. Martin Luther King taught that "non-violence" is the way to peace.

BE INFORMED . . . The McCollum Family, owners of McCollum's Dry Clearners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning.

This Community must respond to this violent act with "non-violence" & direct action. *We urge you to select another Dry Cleaners for your clothing.*

The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you.

Select another cleaners for your clothing!

1-15-90

Unity Community of Albany
Rep. John White, Chairman

---

(3)

No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRISON W. KOHLER
Senior Assistant Attorney General
Counsel of Record
for Petitioner

MICHAEL J. BOWERS
Attorney General

CHARLES M. RICHARDS
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents have asserted that Georgia's Petition for Writ of Certiorari should be denied because the issue of the Equal Protection Clause of the Fourteenth Amendment was not raised in the Georgia Supreme Court (Respondents' Brief, p. 2).

Respondents are clearly incorrect. In its application for interlocutory review the State asserted that the discriminatory exercise of peremptory strikes implicated the Fourteenth Amendment (Appendix D, App. 2). The State cited *Edmondson v. Leesville Concrete Company, Inc.*, 59 U.S. Law Wk. 3286 (Oct. 1, 1990), which at that time was

pending but not yet decided by this Court (Appendix D, App. 3).

The Georgia Supreme Court granted interlocutory review and stated that it was "particularly concerned with" the State constitutional issue (Respondents' Appendix 2). For this reason, the State's original brief focused on State constitutional issues (Appendix E, App. 6-8). However, the State also asserted this argument:

> [T]he racially motivated exercise of peremptory strikes discriminates against the jurors. A person's race is unrelated to his fitness as a juror, and no person should be peremptorily struck simply because of the color of his or her skin. *Batson v. Kentucky*, 476 U.S. at 87. . . .

(Appendix E, App. 9).

Rule 41 of the Georgia Supreme Court provides, "Supplemental briefs may be filed without permission any time before decision." In the Georgia Supreme Court the State filed two supplemental briefs (Appendices F & G, App. 12-15). In these two briefs the State asserted that racial discrimination by a defendant in exercising his peremptory strikes was barred by the Equal Protection Clause of the Fourteenth Amendment, and the State pointed out this Court's intervening decisions in *Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991), and *Edmondson v. Leesville Concrete Company*, 500 U.S. ___, 111 S. Ct. ___, 114 L.Ed.2d 660 (1991). (Appendices F & G, App. 12-15).

As reflected in Justice Benham's dissent, the four-member majority of the Georgia Supreme Court did not decide the case on State constitutional grounds (Petition

for Writ of Certiorari, Appendix B, App. 8-11). Instead, the four-member majority decided the case on federal grounds and held that, under *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S. Ct. ___, 114 L.Ed.2d 660 (1991) a criminal defendant is not prohibited from exercising his peremptory strikes in a racially discriminatory manner (Petition for Writ of Certiorari, Appendix B, App. 3).

Contrary to Respondents' assertions, the Fourteenth Amendment issue raised in this Petition for Writ of Certiorari was presented to the Georgia Supreme Court, which decided the case on federal constitutional grounds. The State of Georgia respectfully requests that the Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX D

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. ___

STATE OF GEORGIA'S APPLICATION FOR INTERLOCUTORY APPEAL

(Filed Oct. 24, 1990)

Respectfully submitted,

MICHAEL J. BOWERS 071650
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QUESTION PRESENTED

In a matter of first impression for this Court, when there is an indictment for assaultive crimes against black victims, do white defendants have the right to exercise their peremptory strikes in a racially discriminatory manner?

JURISDICTION

This case falls within the exclusive jurisdiction of this Court because the appeal involves a construction of the Sixth and Fourteenth Amendments of the United States Constitution and a construction of Georgia Constitution, Art. I, Sec. I, Para. XI. *See* Ga. Const. Art. VI, Sec. VI, Para. II.

ARGUMENT AND CITATION OF AUTHORITY

Appellees, who are white, were indicted for assaultive crimes against the victims, who are black (Exhibit 1; Exhibit 2, p. 1, para. 2; Exhibit 3, p. 1). The State filed a pre-trial motion to prohibit Appellees from exercising their peremptory strikes in a racially discriminatory manner (Exhibit 2). The trial court held that neither Georgia nor federal law prohibited criminal defendants from exercising their peremptory strikes in a racially discriminatory manner but certified the question for immediate review (Exhibit 3).

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that purposeful racial discrimination by the prosecutor in the selection of the venire is unconstitutional. However, the Supreme

Court explicitly stated, "We express no views as to whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.* 476 U.S. at 89, n. 12.

The Eleventh Circuit has held that the principles of *Batson* apply to civil cases. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, ___ U.S. ___ (1989). At present the United States Supreme Court has the issue before it of whether the principles of *Batson* do indeed apply to civil cases. *Edmonson v. Leesville Concrete Co.*, 59 U.S. Law Wk. 3286 (Oct. 1, 1990). Other states have decided that either the state constitution or a state statute requires that neither the state nor the defendant be racially discriminatory in the exercise of peremptory strikes. *See, e.g., State v. Neil*, 457 So.2d 481, 486 (S.C. Fla. 1984); *People v. Pagel*, 232 Cal. Rptr. 104, 107 (1986), *cert. denied*, 481 U.S. 1028 (1987).

The unsettled question is whether the United States Constitution or Georgia's constitutional guarantee of a trial by an impartial jury prohibits a criminal defendant from exercising his peremptory strikes in a racially discriminatory manner. The establishment of a precedent concerning this issue is desirable, Ga. S.Ct. Rule 22(3); and the only way the State can reach this issue in this case is for the Court to grant its application for interlocutory review. If no review is granted at this time and Appellees are acquitted, jeopardy attaches. Even if Appellees are convicted, the State would have no power to enumerate as error the trial court's failure to prohibit Appellees from exercising their peremptory strikes in a racially discriminatory manner.

Therefore, the State of Georgia, by the Attorney General, respectfully urges that this Court grant an interlocutory appeal in this case.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ _____
HARRISON KOHLER 427725
Deputy Attorney General

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APPENDIX E

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM, Appellees.	*	CASE NO. S91A0310

BRIEF ON BEHALF OF APPELLANT
STATE OF GEORGIA
BY THE ATTORNEY GENERAL

ENUMERATION OF ERROR

The trial court erred by ruling that a criminal defendant may use his peremptory strikes in a racially discriminatory manner.

JURISDICTION

The trial court denied the State's pretrial motion to prohibit Appellees, the criminal defendants, from exercising their peremptory strikes in a racially discriminatory manner. The trial court certified the issue for appeal (R. 48-49), and this Court granted the State's application for interlocutory review (R. 3). Jurisdiction lies in this Court because the issue presented involves the construction of

the Georgia Constitution. *See* Ga. Constitution, Art. VI, Sec. VI, Para. II.

STATEMENT OF THE FACTS

Defendants, who are white, were indicted by a Dougherty County grand jury for several assaultive crimes against Myra and Jerry Collins, who are black (R. 12-14, 39, 48). The State filed a pretrial motion to prohibit Defendants from using their peremptory strikes in a racially discriminatory manner. (R. 39-45). A hearing was held and the State's motion was denied. (R. 48-49).

ARGUMENT & CITATION OF AUTHORITY

Georgia's Constitutional Mandate That a Criminal Defendant Shall Have a Trial by an Impartial Jury Precludes a Criminal Defendant from Using His Peremptory Strikes in a Racially Discriminatory Manner.

The Georgia Constitution mandates, "In criminal cases, the defendant *shall have* a public and speedy *trial by an impartial jury*. Art. I, Sec. 1, Para. XI (Emphasis added). The Sixth Amendment to the United States Constitution gives "the accused . . . *the right to* a speedy and public trial, by an impartial jury [emphasis added] . . . . " "[U]nder the Sixth Amendment, neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a petit jury." *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated* 478 U.S. 1001 (1986), *opin. reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was decided on equal protection grounds, and the Supreme Court explicitly stated, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Id.*, 476 U.S. at 89 n. 12; 106 S.Ct. at 1719 n. 12; 90 L.Ed.2d at 82 n. 12.

Although the United States Supreme Court has not decided this issue, numerous state courts have. The Florida Supreme Court has held that under the Florida constitutional guarantee of the right to an impartial jury, both the state and the defense may challenge the proper use of peremptory strikes. *State v. Neil*, 457 So.2d 481, 486-87 (Fla.S.Ct. 1984). "The state, no less than a defendant, is entitled to an impartial jury." *Id.* at 487.

The Massachusetts Supreme Court also decided that its state constitutional guarantee of an impartial jury entitles the commonwealth "to a representative jury, unimpaired by improper exercise of peremptory strikes by the defense." *Commonwealth v. Soares*, 387 N.E.2d 499, 508, 517 n. 35 (Mass.S.Ct. 1979), *cert. denied*, 444 U.S. 881 (1979); *Commonwealth v. Reid*, 424 N.E.2d 495, 500 (Mass.S.Ct. 1981).

California appellate courts have reached the same result but have based their decisions on their state constitutional requirement to have a jury drawn from a representative cross section of the community. *See, e.g., People v. Pagel*, 232 Cal.Rptr. 104, 106 (1986), *cert. denied*, 481 U.S. 1028 (1987); *People v. Wheeler*, 583 P.2d 748 (Cal.S.Ct. 1978). "[T]he People no less than individual defendants are entitled to a trial by *an impartial jury* drawn from a

representative cross section of the community." *People v. Pagel*, 232 Cal.Rptr. at 107; *People v. Wheeler*, 583 P.2d at 765 n. 29 (Emphasis added).

Reported trial court decisions from New York and New Jersey have held that a criminal defendant may not exercise his peremptory strikes in a racially discriminatory manner. *See, e.g., People v. Gary M.*, 526 N.Y.Supp.2d 986 (Kings Cty.,N.Y.,S.Ct. 1988); *State v. Alvarado*, 534 A.2d 440 (Union Cty.,N.J.,Sup.Ct. 1987).

In the jury selection of a criminal case, three entities, in addition to the defendant, have a right to a fair and impartial jury. Although the victim is not a party in a criminal case, his or her interests, both emotional and sometimes financial, can be vitally affected. "It is declared to be the policy of this state that restitution to their victims by those found guilty of crimes is a primary concern of the criminal justice system." O.C.G.A. § 17-14-1. Georgia's constitutional requirement that the criminal defendant have an impartial jury, not one biased in his favor, means the victim is also entitled to an impartial jury.

Second, society is entitled to an impartial jury in the trial of a criminal defendant. The racially discriminatory exercise of peremptory strikes by either the state or the defendant undermines confidence in the fairness of our system of justice. *See generally, Batson v. Kentucky*, 479 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81. Moreover, if a society believes that a criminal defendant is able to obtain an acquittal by the racially discriminatory use of peremptory strikes, there can be the motivation for self-help and vigilante justice. *See generally, Conner v. State*, 251 Ga. 113,

120, 303 S.E.2d 266, (1983), *cert. denied*, 464 U.S. 865 (1983). Where the state proves the defendant guilty beyond a reasonable doubt, the purposes of criminal punishment – deterrence, protection of society, and retribution – should be carried out. *See generally, Conner v. State*, 251 Ga. at 120.

Third, the racially motivated exercise of peremptory strikes discriminates against the jurors. A person's race is unrelated to his fitness as a juror, and no person should be peremptorily struck simply because of the color of his or her skin. *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81.

Peremptory challenges are not of constitutional dimension, O.C.G.A. § 15-12-165, and racially discriminatory challenges must give way to Georgia's constitutional requirement that the criminal defendant shall have an impartial jury. As Justice Marshall stated

> Our criminal justice system "requires not only freedom from bias against the accused but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

Batson v. Kentucky, 476 U.S. at 107, 106 S.Ct. at 1729, 90 L.Ed.2d at 95 (J. Marshall concurring).

Georgia's mandate that the defendant shall have an impartial jury means that under our constitution, neither the State nor the criminal defendant can discriminate in jury selection. Therefore, the State respectfully prays this Court reverse the trial court and direct that the criminal

defendants in this case may not use their peremptory strikes in a racially discriminatory manner.

Respectfully submitted,

/s/ Michael J. Bowers
MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Deputy Attorney General

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Robert H. Revell, Jr., Esq.
Attorney at Law
P. O. Box 70455
Albany, GA 31707-0008

Jesse W. Walters, Esq.
Attorney at Law
P. O. Box 469
Albany, GA 31702

This 4th day of December, 1990.

/s/ Harrison Kohler
HARRISON KOHLER
Deputy Attorney General

APPENDIX F

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	*	
Appellant,	*	CASE
	*	NO. S91A0310
v.	*	
	*	
THOMAS McCOLLUM,	*	
WILLIAM JOSEPH McCOLLUM,	*	
and ELLA HAMPTON McCOLLUM,	*	
Appellees.	*	

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Powers v. Ohio*, 59 U.S.L.W. 4268 (April 1, 1991), the United States Supreme Court held that a white criminal defendant had standing to assert the interest of black jurors from being peremptorily struck from the jury for racially discriminatory reasons. "[R]acial discrimination in the disqualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Id.*

That Court added:

> The purpose of the jury system is to impose upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.

Id.

It is the position of the State that not only does Georgia's Constitution prohibit a defendant from exercising his peremptory strikes in a racially discriminatory manner, but also the Equal Protection Clause of the Fourteenth Amendment protects jurors from being struck by a criminal defendant for racially discriminatory reasons.

This 9th day of April, 1991.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
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APPENDIX G

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	*	
Appellant,	*	CASE NO. S91A0310
v.	*	
THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,	*	
Appellees.	*	

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Edmondson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 89-7743 (June 3, 1991), the United States Supreme Court held that private litigants in a civil case cannot be racially discriminatory in the exercise of peremptory strikes. In a civil trial the exclusion of jurors on account of race violates the prospective juror's equal protection rights. *Id.*

> By enforcing a discriminatory peremptory challenge, the court has not only made itself a party to the biased act but has elected to place its power, property, and prestige behind the alleged discrimination . . . and in a significant way has involved itself with invidious discrimination.

Id.

Clearly, the principles of *Batson* are not limited to the State, but are applicable to a criminal defendant. By exercising his peremptory strikes in a racially discriminatory manner, a criminal defendant violates both the Georgia Constitution and the Equal Protection Clause of the Fourteenth Amendment.

This 4th day of June, 1991.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
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No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

JOINT APPENDIX

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Counsel for Respondents

*Counsel of Record

Petition for Certiorari Filed September 3, 1991
Certiorari Granted November 4, 1991

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TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

Superior Court of Dougherty County
State of Georgia

8/10/90	INDICTMENT charging McCollums with four counts of aggravated assault and two counts of simple battery.
10/2/90	MOTION By State of Georgia with attachment and brief.
10/22/90	ORDER of Superior Court denying State's motion.
1/22/91	STIPULATION with attachment

No. 90R816

SUPERIOR COURT, DOUGHERTY COUNTY

May Term, 1990

THE STATE

vs.

Thomas Scott McCollum
William Joseph McCollum
Ella Hampton McCollum

Ct. 1-2 Aggravated Assault (2 cts.) – (T. S. McCollum)

Ct. 3- Simple Battery (W. J. McCollum)

Ct. 4- Simple Battery (Ella Hampton McCollum)

Ct. 5 & 6Aggravated Assault – 2 cts. (W. J. McCollum)

True BILL
/s/ Milton O. Tate
Foreman

BRITT R. PRIDDY, District Attorney

Jerry Collins/Myra Collins
Prosecutor

x INDICTMENT
___ SPECIAL PRESENTMENT
___ ACCUSATION

Received in Open Court from the sworn Grand Jury Bailiff and filed in office this 10 day of Aug. 1990.

/s/ Imanell Gable
Clerk

WITNESSES FOR THE STATE
/s/ Jerry Collins
/s/ Myra Collins

GEORGIA, DOUGHERTY COUNTY:

THE GRAND JURORS, selected, chosen and sworn for the County of Dougherty, to-wit:

	1 Milton O. Tate Foreman		
2	Stephen G. Bailey	13	Joanne Wilson
3	Shirley Cates	14	James Edward Lamb
4	Marnie Parrish	15	Alonzer Gilbert, Jr.
5	Jeanette Marsh Geeslin	16	Flora Caruthers Lewis
6	Anissa Lane Fowler	17	Nadara M. Lentz
7	Karen O'Connor Floyd	18	Barbara Odom Mixon
8	Larry F. Braun	19	Charles Q. Wright, III
9	Nathaniel Harris	20	Bill Hughey
10	Walter M. Blankenship, Jr.	21	Hoyt Palmer
11	Frances Black	22	John H. Scott, Jr.
12	Robert Lee James	23	Barbara W. Reese

COUNT I

In the name and behalf of the citizens of Georgia, charge and accuse Thomas Scott McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, Nineteen Hundred and Ninety, did then and there unlawfully make an assault upon the person of Myra Collins by striking her on the forehead with a certain baseball bat and a certain wall plaque, instruments which when used offensively against a person are likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT II

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse Thomas Scott McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did then and there unlawfully make an assault upon the person of Jerry Collins by attempting to strike him with a certain baseball bat, an instrument which when used offensively against a person is likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT III

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse William Joseph McCollum with the offense of Simple Battery for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did intentionally cause physical harm to Myra Collins by beating her with his hands knocking her to the floor,

contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT IV

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse Ella Hampton McCollum with the offense of Simple Battery for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did intentionally cause physical harm to Myra Collins by repeatedly kicking her, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT V

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse William Joseph McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did then and there unlawfully make an assault upon the person of Myra Collins by assaulting her with a certain gun, an instrument which when used offensively against a person is likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT VI

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse William Joseph McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did then and there unlawfully make an assault upon the person of Myra Collins by beating her head on a counter top, an instrument which when used offensively against a person is likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof.

/s/ Milton O. Tate

FOREMAN, GRAND JURY

BRITT R. PRIDDY,
DISTRICT ATTORNEY

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
v.	*	INDICTMENT
THOMAS SCOTT McCOLLUM,	*	NO. 90 R 816
WILLIAM JOSEPH McCOLLUM,	*	
and ELLA HAMPTON	*	
McCOLLUM,	*	
	*	
Defendants.		

STATE'S MOTION TO PROHIBIT DEFENDANTS' EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER

Now comes the State of Georgia, by the Attorney General, and prays that this Court enter an order requiring that if during the jury selection in this case the State makes out a prima facie case that the Defendants are exercising their peremptory strikes in a racially discriminatory manner, the Defendants must give a neutral reason for the exercise of each peremptory strike or the black juror will be placed on the petit jury.

1.

The Defendants have been indicted for several assaultive crimes against the victims. The Defendants are white, and the victims are black.

2.

Two of the key eyewitnesses in this case, whom the State expects to call to testify at trial, are black.

3.

The State expects that its evidence will show that the race of the victims was a factor in the Defendants' assaults upon the victims.

4.

In Dougherty County approximately 43% of the population is black. Attached to this pleading is a copy of 1980 Census figures for Dougherty County. If the venire mirrors the racial makeup of Dougherty County, 18 of the 42 jurors on the panel will be black. The Defendants potentially can strike all black jurors with their 20 peremptory strikes.

Therefore, the State respectfully requests that if during jury selection the State makes out a prima facie case that Defendants are exercising their peremptory strikes in a racially discriminatory manner, this Court require that Defendants give a neutral explanation for the peremptory

strikes of each black juror or those jurors will be placed on the petit jury.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Deputy Attorney General

PLEASE SERVE:

HARRISON KOHLER
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Atlanta, Georgia 30334
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Table 45. **Age by Race, Spanish Origin, and Sex for Counties: 1980** – Con.

[For meaning of symbols, see introduction. For definitions of terms, see appendixes A and B]

Counties	Race							
	Total		White		Black		Spanish origin[3]	
	Male	Female	Male	Female	Male	Female	Male	Female
				DOUGHERTY				
Total persons	48 031	52 687	27 886	28 885	19 749	23 331	553	603
Under 5 years	4 621	4 473	2 206	2 065	2 368	2 360	60	81
Under 1 year	1 005	920	477	413	518	496	13	17
1 year	940	887	462	417	467	463	13	13
2 years	903	906	433	415	461	482	13	15
3 years	855	862	388	414	459	437	13	22
4 years	918	898	446	406	463	482	8	14
5 to 9 years	4 855	4 738	2 307	2 279	2 497	2 405	67	54
5 years	925	940	424	446	491	482	13	15
6 years	926	925	426	419	491	494	12	9
7 years	972	970	451	490	511	470	20	9
8 years	1 020	892	486	441	522	445	9	12
9 years	1 012	1 011	520	483	482	514	13	9
10 to 14 years	4 693	4 424	2 438	2 169	2 225	2 220	52	62
10 years	1 011	928	515	492	488	434	14	12
11 years	933	857	496	412	429	439	7	9
12 years	863	836	450	379	410	448	9	11
13 years	936	889	479	441	452	436	10	16
14 years	950	914	498	445	446	463	12	14
15 to 19 years	5 367	5 357	2 646	2 506	2 679	2 813	82	59
15 years	993	1 024	521	495	468	523	14	14
16 years	1 080	1 061	545	494	527	559	11	5

Counties	Total		Race					
			White		Black		Spanish origin[3]	
	Male	Female	Male	Female	Male	Female	Male	Female
17 years	1 189	995	560	478	620	508	23	14
18 years	1 081	1 090	537	524	533	557	18	13
19 years	1 024	1 187	483	515	531	666	16	13
20 to 24 years	4 675	5 392	2 575	2 723	2 043	2 611	70	66
20 years	889	1 147	459	518	420	618	13	10
21 years	921	1 068	471	505	436	547	17	18
25 to 29 years	4 454	4 827	2 608	2 525	1 810	2 240	57	52
30 to 34 years	3 840	4 076	2 429	2 402	1 370	1 626	37	48
35 to 39 years	2 777	3 088	1 909	1 934	843	1 108	22	39
40 to 44 years	2 302	2 640	1 607	1 662	678	948	13	26
45 to 49 years	2 200	2 453	1 550	1 605	636	833	16	18
50 to 54 years	2 112	2 490	1 533	1 629	561	847	24	29
55 to 59 years	1 886	2 260	1 339	1 531	538	719	13	14
60 to 64 years	1 565	1 853	1 131	1 198	431	651	13	15
65 to 69 years	1 170	1 612	757	938	410	671	9	14
70 to 74 years	762	1 172	438	654	322	515	8	11
75 to 79 years	417	861	229	473	188	386	6	6
80 to 84 years	201	541	123	348	77	192	2	6
85 years and over	134	430	61	244	73	186	2	3
18 years and over	30 600	35 972	19 309	20 905	11 044	14 756	326	373
62 years and over	3 565	5 638	2 230	3 311	1 329	2 314	36	47
65 years and over	2 684	4 616	1 608	2 657	1 070	1 950	27	40
Median	24.8	26.9	28.4	30.4	20.3	23.4	21.1	23.3

[3] Persons of Spanish origin may be of any race.

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
v.	*	
	*	
THOMAS SCOTT McCOLLUM,	*	INDICTMENT
WILLIAM JOSEPH McCOLLUM,	*	NO. 90 R 816
and ELLA HAMPTON	*	
McCOLLUM,	*	
	*	
Defendants.		

BRIEF IN SUPPORT OF STATE'S MOTION TO PROHIBIT DEFENDANTS' EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that purposeful racial discrimination by the prosecutor in the selection of the venire violates a defendant's right to equal protection. The Court stated that racial discrimination in the selection of jurors harms not only the Defendant but also undermines public confidence in the fairness of our system of justice. *Id.* 90 L.Ed.2d at 81.

In *Batson* the Supreme Court did not reach the issue as to whether or not the principles of *Batson* are applicable to defense counsel. The Court explicitly stated, "We express no views as to whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Batson v. Kentucky*, 90 L.Ed.2d at 82, n.12. However, the concurring opinion of Justice Marshall is significant as to this issue:

> Our criminal justice system "requires not only freedom from any bias against the accused, but

> also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held."

Batson v. Kentucky, 90 L.Ed.2d at 95.

The Sixth Amendment mandates a "trial by an impartial jury." The Eleventh Circuit has held that the principles of *Batson* apply to both civil and criminal cases and are, therefore, applicable to private parties. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 201. Under the Sixth Amendment, "neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a criminal petit jury." *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated* 478 U.S. 1001 (1986), *op. reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

Moreover, Georgia's Constitution mandates a "trial by an impartial jury." Art. I, Sec. I, Para. XI. Georgia law also requires a jury selected from a "fairly representative cross-section of the intelligent and upright citizens of the county." O.C.G.A. § 15-12-40(a)(1). Although the Georgia appellate courts have not reached this issue, the State respectfully asserts that the principles of *Batson* are applicable to a criminal defendant not only by the United States Constitution but are also made applicable under both the Georgia Constitution and statutes.

Therefore, the State respectfully prays that its motion be granted.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER
427725
Deputy Attorney General

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(Certificate Of Service Omitted In Printing)

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
V.	*	
	*	
THOMAS McCOLLUM, WILLIAM	*	INDICTMENT
JOSEPH McCOLLUM, and ELLA	*	NO. 90 R 816
HAMPTON McCOLLUM,	*	
	*	
Defendants.	*	
	*	

ORDER

(Filed Oct. 22, 90)

The Defendants, who are white, are charged with several assaultive crimes against the victims, who are black. The State has moved that if, during jury selection, the State makes out a prima facie case that Defendants are exercising their peremptory strikes in a racially discriminatory manner, the Defendants must give a neutral reason for the exercise of each peremptory strike. The State has argued that the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), are applicable to a criminal defendant under both federal and state law.

This Court is aware of no Georgia appellate law on this issue and denies the State's Motion. Neither Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner.

THE STATE'S MOTION IS DENIED

However, because this issue is one of first impression for the Georgia courts, this order is of such importance to the case that an immediate review should be had.

This 22 day of Oct., 1990.

/s/ Asa D Kelley Jr
ASA D. KELLEY, JR.
Chief Judge
Dougherty Judicial Circuit

(SEAL)

SUPREME COURT
STATE OF GEORGIA
STATE JUDICIAL BUILDING
Atlanta 30334

HAROLD G. CLARKE, CHIEF JUSTICE
GEORGE T. SMITH, PRESIDING JUSTICE
CHARLES L. WELTNER
RICHARD BELL
WILLIS B. HUNT, JR.
ROBERT BENHAM
NORMAN S. FLETCHER
JUSTICES

JOLINE B. WILLIAMS,
CLERK
WM. SCOTT HENWOOD,
REPORTER

NOV 15, 1990

TO ALL COUNSEL:

RE: Application No. S91I0118, State of Georgia v. Thomas McCollum, et al.

The Court today granted this application for *interlocutory* appeal. All the Justices concur.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

The Court is particularly concerned with, and requests that you address in your briefs, the following:

Whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner.

Joline B. Williams, Clerk
BY Lynn M. Hogg

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. S91A0310

BRIEF ON BEHALF OF APPELLANT
STATE OF GEORGIA

BY THE ATTORNEY GENERAL

ENUMERATION OF ERROR

The trial court erred by ruling that a criminal defendant may use his peremptory strikes in a racially discriminatory manner.

JURISDICTION

The trial court denied the State's pretrial motion to prohibit Appellees, the criminal defendants, from exercising their peremptory strikes in a racially discriminatory manner. The trial court certified the issue for appeal (R. 48-49), and this Court granted the State's application for interlocutory review (R. 3). Jurisdiction lies in this Court because the issue presented involves the construction of the Georgia Constitution. *See* Ga. Constitution, Art. VI, Sec. VI, Para. II.

STATEMENT OF THE FACTS

Defendants, who are white, were indicted by a Dougherty County grand jury for several assaultive crimes against Myra and Jerry Collins, who are black (R. 12-14, 39, 48). The State filed a pretrial motion to prohibit Defendants from using their peremptory strikes in a racially discriminatory manner. (R 39-45). A hearing was held and the State's motion was denied. (R. 48-49).

ARGUMENT & CITATION OF AUTHORITY

Georgia's Constitutional Mandate That a Criminal Defendant Shall Have a Trial by an Impartial Jury Precludes a Criminal Defendant from Using His Peremptory Strikes in a Racially Discriminatory Manner.

The Georgia Constitution mandates, "In criminal cases, the defendant *shall have* a public and speedy *trial by an impartial jury*. Art. I, Sec. 1, Para. XI (Emphasis added). The Sixth Amendment to the United States Constitution gives "the accused . . . *the right to* a speedy and public trial, by an impartial jury [emphasis added]. . . . " "[U]nder the Sixth Amendment, neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a petit jury." *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated* 478 U.S. 1001 (1986), *opin. reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was decided on equal protection

grounds, and the Supreme Court explicitly stated, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel" *Id.*, 476 U.S. at 89 n. 12; 106 S.Ct. at 1719 n. 12; 90 L.Ed.2d at 82 n. 12.

Although the United States Supreme Court has not decided this issue, numerous state courts have. The Florida Supreme Court has held that under the Florida constitutional guarantee of the right to an impartial jury, both the state and the defense may challenge the improper use of peremptory strikes. *State v. Neil*, 457 So.2d 481, 486-87 (Fla.S.Ct. 1984). "The state, no less than a defendant, is entitled to an impartial jury." *Id.* at 487.

The Massachusetts Supreme Court also decided that its state constitutional guarantee of an impartial jury entitles the commonwealth "to a representative jury, unimpaired by improper exercise of peremptory strikes by the defense." *Commonwealth v. Soares*, 387 N.E.2d 499, 508, 517 n. 35 (Mass.S.Ct. 1979), *cert. denied*, 444 U.S. 881 (1979); *Commonwealth v. Reid*, 424 N.E.2d 495, 500 (Mass.S.Ct. 1981).

California appellate courts have reached the same result but have based their decisions on their state constitutional requirement to have a jury drawn from a representative cross section of the community. *See, e.g., People v. Pagel*, 232 Cal.Rptr. 104, 106 (1986), *cert. denied*, 481 U.S. 1028 (1987); *People v. Wheeler*, 583 P.2d 748 (Cal.S.Ct. 1978). "[T]he People no less than an individual defendants are entitled to a trial by *an impartial jury* drawn from a representative cross section of the community." *People v.*

Pagel, 232 Cal.Rptr. at 107; *People v. Wheeler*, 583 P.2d at 765 n. 29 (Emphasis added).

Reported trial court decisions from New York and New Jersey have held that a criminal defendant may not exercise his peremptory strikes in a racially discriminatory manner. *See, e.g., People v. Gary M.*, 526 N.Y.Supp.2d 986 (Kings City.,N.Y.,S.Ct. 1988); *State v. Alvarado*, 534 A.2d 440 (Union City.,N.J.,Sup.Ct. 1987).

In the jury selection of a criminal case, three entities, in addition to the defendant, have a right to a fair and impartial jury. Although the victim is not a party in a criminal case, his or her interest, both emotional and sometimes financial, can be vitally affected. "It is declared to be the policy of this state that restitution to their victims by those found guilty of crimes is a primary concern of the criminal justice system." O.C.G.A. § 17-14-1. Georgia's constitutional requirement that the criminal defendant have an impartial jury, not one biased in his favor, means the victim is also entitled to an impartial jury.

Second, society is entitled to an impartial jury in the trial of a criminal defendant. The racially discriminatory exercise of peremptory strikes by either the state or the defendant undermines confidence in the fairness of our system of justice. *See generally, Batson v. Kentucky*, 479 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81. Moreover, if a society believes that a criminal defendant is able to obtain an acquittal by the racially discriminatory use of peremptory strikes, there can be the motivation for self-help and vigilante justice. *See generally, Conner v. State*, 251 Ga. 113, 120, 303 S.E.2d 266 (1983), *cert. denied*, 464 U.S. 865 (1983).

Where the state proves the defendant guilty beyond a reasonable doubt, the purposes of criminal punishment – deterrence, protection of society, and retribution – should be carried out. *See generally, Conner v. State*, 251 Ga. at 120.

Third, the racially motivated exercise of peremptory strikes discriminates against the jurors. A person's race is unrelated to his fitness as a juror, and no person should be peremptorily struck simply because of the color of his or her skin. *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81.

Peremptory challenges are not of constitutional dimension, O.C.G.A. § 15-12-165, and racially discriminatory challenges must give way to Georgia's constitutional requirement that the criminal defendant shall have an impartial jury. As Justice Marshall stated

> Our criminal justice system "requires not only freedom from bias against the accused but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

Batson v. Kentucky, 476 U.S. at 107, 106 S.Ct. at 1729, 90 L.Ed.2d at 95 (J. Marshall concurring).

Georgia's mandate that the defendant shall have an impartial jury means that under our constitution, neither the State nor the criminal defendant can discriminate in jury selection. Therefore, the State respectfully prays this Court reverse the trial court and direct that the criminal

defendants in this case may not use their peremptory strikes in a racially discriminatory manner.

Respectfully submitted,

/s/ Michael J. Bowers
MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Deputy Attorney General

PLEASE ADDRESS ALL
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(Certificate Of Service Omitted In Printing)

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	:	
Appellant	:	
v.	:	
THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM,	:	CASE NO. S91A0310
Appellees	:	

BRIEF ON BEHALF OF APPELLEES

I. NATURE AND HISTORY OF THE CASE.

This case comes to the Supreme Court of Georgia from the Superior Court of Dougherty County, Georgia, and it arises out of warrants taken and indictments issued against the Appellees as a result of an alleged altercation between the Appellees and parties by the name of Myra Collins and Jerry Collins. The altercation allegedly took place at the place of business of the Appellees (McCollum's Cleaners, 615 E. Broad Avenue, Albany, Georgia). (R.28)[1] A dispute apparently arose concerning services rendered for Myra Collins and Jerry Collins and the dispute generated into a fight between the Appellees and Myra Collins and Jerry Collins. (R.29). The Appellees are white and the Collins are black.

[1] Numbers in parenthesis refer to pages of record.

THE STATE FILED A PRETRIAL MOTION ENTITLED "STATE'S MOTION TO PROHIBIT DEFENDANTS' EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER." On October 22, 1990 hearing of the aforementioned motion was had before the Honorable Asa D. Kelley, Jr., Chief Judge of the Dougherty Judicial Circuit, at which hearing it was stipulated that a communique or notice in the form of Exhibit "A", attached hereto, was circulated throughout the black community of Albany, Dougherty County, Georgia.

After such hearing, Judge Kelley denied the State's motion and in his order certified that the issue was of such importance that an immediate review should be had. (R.48 & 49).

This Court on November 15, 1990 granted the State's Application for Interlocutory Appeal and the case is now before this Court for determination.

This Court in its Order granting the Application for Interlocutory Appeal, provided that the Court was particularly concerned with whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner.

ARGUMENT AND CITATIONS OF AUTHORITY

ARTICLE I, SECTION I, PARAGRAPH 11 OF THE CONSTITUTION OF GEORGIA PLACES NO RESTRICTIONS ON A CRIMINAL DEFENDANT'S USE OF PEREMPTORY STRIKES IN THE SELECTION OF A JURY AND THEREFORE DOES NOT PRECLUDE A CRIMINAL DEFENDANT FROM UTILIZING HIS PEREMPTORY STRIKES IN ANY MANNER DESIRED.

Article I, Section 1, Paragraph 11 of the Constitution of Georgia provides, in part, as follows:

> " . . . In criminal cases, the defendant shall have a public and speedy trial by an impartial jury . . . "

and further in part,

"The General Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors . . . "

O.C.G.A Section 15-12-165 provides:

"Every person indicted for a crime or offense which may subject him to death or to imprisonment for not less than four years may peremptorily challenge 20 of the jurors empaneled to try him. Every person indicted for an offense which may subject him to imprisonment in a penal institution for any time less than four years may peremptorily challenge 12 of the jurors empaneled to try him. The State shall be allowed one-half the number of peremptory challenges allowed to the accused. (Laws 1833, Cobb's 1851 Digest. p. 835; Code 1863, § 4530; Code 1868, § 4549; Code 1873, § 4643; Code

1882, § 4643; Penal Code 1895, § 974; Penal Code 1910, § 1000; Code 1933, § 59-805.)".

It is thus seen that the State of Georgia has at least since the year 1833 had statutes pertaining to peremptory challenges. We find no case in Georgia placing any limitation on the use of peremptory challenges by a defendant.

There have been contentions made in the State of Georgia that the State, in exercising its peremptory challenge of jurors, systematically struck from the panel of jurors black men and that such constituted a violation of a defendant's constitutional rights. This Court has constantly held where such challenges were made, that a peremptory challenge is an arbitrary or capricious species of challenge to a certain number of jurors allowed to the parties without the necessity of their showing any consideration therefor. In the very nature of such a challenge, no reason need be shown or assigned for the exercise of the right.

See: ***Watkins v. State,*** 199 Ga. 81, 94 (35 SE2d 325); ***Hatton v. Smith,*** 228 Ga. 378 (2) (185 SE2d 388); ***Hoggs. v. State,*** 229 Ga. 556 (6) (192 SE2d 903; ***Willis v. State,*** 243 Ga. 185 (2), (253 SE2d 70); ***Blackwell v. State,*** 248 Ga. 138, (281 SE 2d 599); ***Pope v. State,*** 256 Ga. 195 (345 SE2d 831).

However, the case of ***Batson v. Ky.,*** 476 US 79, 90 L Ed 2d 69, 106 S Ct 1713, holds in a split decision that a prosecutor's use of peremptory challenges to exclude blacks from a jury trying black defendants is a basis for an equal protection claim of purposeful discrimination. The Supreme Court of Georgia has given credence to ***Batson*** and the law of Georgia now is that a prosecutor's use of peremptory challenges to excuse blacks is a basis

for a defendant contending that the prosecutor, or State, used its peremptory strikes to excuse blacks, simply because of their color. However, ***Batson*** did not reach the issue as to whether its principles were applicable to a defendant's use of peremptory challenges and, as stated above, we find no case in Georgia placing any limitations on the use of peremptory challenges by a defendant. The equal protection clause of the United States Constitution is designed to insure that a defendant is not discriminated against by the United States or by any of its states.

This Court's directions seem to indicate that the Court is particularly concerned with the Georgia Constitution's guarantee of the right to impartial trial and whether or not such right precludes a criminal defendant from using his peremptory strikes in any manner he chooses. Georgia's Constitution, as set forth above, provides:

> "In criminal cases the defendant shall have a public and speedy trial by an impartial jury . . . ".

Clearly this provision guarantees that a defendant will have a venire placed upon him that represents a cross-section of the community and from which he may have the right to select jurors that are not partial or may not be more partial to the other side of the case. A defendant's reason for excusing a venireman should not be subject to judicial scrutiny.

Both Article I, Section 1, Paragraph 11, of the Constitution of Georgia and the Sixth Amendment to the United States Constitution were designed to protect individual persons against the arbitrary use of power by the State.

The Supreme Court of the United States held in the case of ***Holland v. Illinois,*** 493 US ___, 107 L Ed 2d 905, 110 S Ct ___, that a prosecutor's exercise of peremptory challenges to exclude all black potential jurors from white defendants' petit juries did not violate defendant's Sixth Amendment right to trial by impartial jury. In ***Holland, supra,*** beginning on Page 916, the Supreme Court had the following to say:

> "The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring not a representative jury (which the Constitution does not demand), but an impartial one (which it does). Without that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the pool in its favor. The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.
>
> But to say that the Sixth Amendment deprives the State of the ability to 'stack the deck' in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side. Any theory of the Sixth Amendment leading to that result is implausible. The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of ***Blackstone,*** see

4 *W. Blackstone Commentaries* 346-348 (1769), was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, see Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat 119, was recognized in an opinion by Justice Story to be part of the common law of the United states, see *United States v. Marchant,* 12 Wheat 480, 483-484, 6 L Ed 2d 700 (1827), and has endured through two centuries in all the States, see *Swain, supra,* at 215-217, 13 L Ed 2d 759, 86 S Ct 824. The constitutional phrase 'impartial jury' must surely take its content from this unbroken tradition. One could plausibly argue (though we have said the contrary, see *Stilson v. United States,* 250 US 583, 586, 63 L Ed 1154, 40 S Ct 28 (1919)) that the requirement of an 'impartial jury' impliedly compels peremptory challenges, but in no way could it be interpreted directly or indirectly to prohibit them. We have gone out of our way to make this clear in our opinions. In *Lockhart,* we said: 'We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.' 476 US, at 173, 90 L Ed 2d 137, 106 S Ct 1758. In *Taylor,* we 'emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition.' 419 US, at 538, 42 L Ed 2d 690, 95 S Ct 692. Accord, *Duren v. Missouri,* 439 US, at 363-364, and n 20, 58 L Ed 2d 579, 99 S Ct 664.

The fundamental principle underlying today's decision is the same principle that underlay *Lockhart,* which rejected the claim that allowing challenge for cause, in the guilt phase of a capital trial, to jurors unalterably opposed to the death penalty (so-called 'Witherspoon-excludables') violates the fair-cross-section requirement. It does not violate that requirement, we said, to disqualify a group for a reason that is related 'to the ability of members of the group to serve as jurors in a particular case.' 476 US, at 175, 90 L Ed 2d 137, 106 S Ct 1758 (emphasis added). The 'representativeness' constitutionally required at the venire stage can be disrupted at the jury-panel state to serve a State's 'legitimate interest.' Ibid. In *Lockhart* the legitimate interest was 'obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.' Id., at 175-176, 90 L Ed 2d 137, 106 S Ct 1758. Here the legitimate interest is the assurance of impartiality that the system of peremptory challenges has traditionally provided.

The rule we announce today is not only the only plausible reading of the text of the Sixth Amendment, but we think it best furthers the Amendment's central purpose as well. Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants; neither the defendant nor the State should be favored. This goal, it seems to us, would positively be obstructed by a petit jury cross-section requirement which, as we have described, would cripple the device of peremptory challenge. We have acknowledged

that that device occupies 'an important position in our trial procedures,' ***Batson,*** 476 US, at 98, 90 L Ed 2d 69, 106 S Ct 1712, and has indeed been considered 'a necessary part of trial by jury,' ***Swain v. Alabama,*** 380 US, at 219, 13 L Ed 2d 759, 85 S Ct 824. Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' ibid., thereby 'assuring the selection of a qualified and unbiased jury,' *Batson, supra,* at 91, 90 L Ed 2d 69, 106 S Ct 1712 (emphasis added)."

No claim is made relative to the venire in Dougherty County, Georgia not representing a fair-cross-section of the community of Dougherty County, Georgia. This is what is required by the Sixth Amendment to the Constitution of the United States and by Article I, Section 1, Paragraph 11 of the Constitution of Georgia.

Peremptory challenges have been described as a necessary part of trial by jury. See ***Swain v. Alabama,*** 380 US 202, at 219, 13 L Ed 2d 759, 85 S Ct 824. As Justice Rehnquist (now Chief Justice Rehnquist), stated in his dissent in ***Batson v. Ky.,*** 90 L Ed 2d at pages 114 and 115:

"In my view, there is simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on. [470 US 138]. This case-specific use of peremptory challenges by the State does not single out

blacks, or members of any other race for that matter, for discriminatory treatment. Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see – and the Court most certainly has not explained – how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See ante, at 84-85, n.4, 90 L Ed 2d at 79-80. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving non-black defendants, it harms neither the excluded jurors nor the remainder of the community. See ante, at 87-88, 90 L Ed 2d, at 81-82.

The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges . . . ".

Georgia has had a system of peremptory challenges for well over 150 years without any Court in the State of Georgia determining that a defendant's use thereof could

be set aside on the claim that such peremptory challenges were subject to judicial scrutiny. This system should not be changed by judicial fiat. Peremptory is defined in Black's Law Dictionary as: "Imperative; absolute; conclusive; positive; not admitting a question, delay or reconsideration. Positive; final; decisive; not admitting of any alternative. Self-determined; arbitrary; not requiring any consideration to be shown." This Court should not disturb the long standing rule that a criminal defendant has the right to exercise peremptory challenges in any manner chosen.

Batson specifically does not apply to the exercise of peremptory challenges by defendants. ***Batson,*** 476 US at 89, n.12; 106 S Ct at 1719 n.12; 90 L Ed 2d at 82 n. 12. *Batson* holds that the equal protection clause of the United States Constitution prohibits a prosecutor from purposefully exercising peremptory challenges to exclude potential jurors solely on account of race.

Holland specifically holds that prosecutors' exercise of peremptory challenges to exclude all black potential jurors from white defendants' petit jury does not violate defendants' Sixth Amendment right to trial by impartial jury. This decision should put to rest any claim that the use of peremptory challenges by a defendant is in any manner subject to scrutiny under the Sixth Amendment to the U. S. Constitution and likewise under Article I, Section I, Paragraph XI of the Georgia Constitution.

ASIDE FROM THE FOREGOING, THE QUESTION OF RACE HAS BEEN INJECTED IN THIS CASE BY THE BLACK COMMUNITY AND THUS HAS MADE IT ESSENTIAL FOR THE DEFENDANTS TO HAVE THE RIGHT TO UTILIZE PEREMPTORY STRIKES TO EXCLUDE BLACKS FROM THE TRIAL JURY.

Following the altercation out of which this case arose, there was circulated throughout the black community a communique or notice calling upon the black community to take action against the white parties who are now defendants in this case. A copy of such advertisement is attached hereto, and it can easily be seen from such attachment that race has been injected into this matter. It may be that some black persons of the community are not aware of such communique or notice. However, the defendants cannot inquire upon voir dire of the blacks on the venire if they are aware of such communique or advertisement, without calling to the attention of such blacks the contents of such communique or notice. Clearly under such circumstances, the defendants are entitled to peremptorily excuse members of the black race from the trial jury, not because they are black, but because they are black and the black community has attempted to prejudice blacks against the white defendants in this case.

Should a person of Iraqi descent charged with committing an assault on a Jewish person be able to excuse by peremptory challenge Jewish jurors on the belief that such jurors could conceivably be inclined to be more partial to a Jewish prosecutor. To ask the question is to answer it. Should a defendant charged with an assault

upon a person with long hair be permitted to peremptorily excuse males on the venire with long hair because of his belief that a male with long hair would be more apt to be partial toward a prosecutor with long hair? The provisions of ***Batson v. Ky., supra*** are absolutely unworkable if applied to a criminal defendant.

As was said in ***Swain, supra,***

> "While challenges for cause permit rejection of jurors on a narrowly specified provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. ***Hayes v. Missouri,*** 120 US 68, 70 [30 L Ed 1011, 13 S Ct 136] [1892], upon a juror's 'habits and associations,' ***Hayes v. Missouri, supra,*** at 70 [30 L Ed 578, 7 S Ct 350], or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' ***Lewis, supra,*** at 376 [36 L Ed 1011, 13 S Ct 136]. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people [476 US 136] summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

As was said in ***Swain*** what defense counsel in this case must decide is not whether a juror of the black race is in fact partial, but whether one from a different race is less likely to be partial. Group affiliations in the context of the case to be tried is a permissible reason for counsel to peremptorily challenge a member of a specified group.

CONCLUSION

Georgia law does not warrant a decision that a criminal defendant's use of peremptory challenges is subject to scrutiny. A criminal defendant may use his peremptory challenges for any reason, rightly or wrongly, seen fit. The decision of the lower court should be affirmed.

Respectfully submitted,

PERRY, WALTERS & LIPPITT

BY: /s/ Jesse W. Walters
JESSE W. WALTERS

/s/ Robert H. Revell
ROBERT H. REVELL, JR.
ATTORNEYS FOR APPELLEES

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"KEEP THE DREAM ALIVE"

Dr. Martin Luther King taught that "non-violence" is the way to peace.

BE INFORMED . . . The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning.

This Community must respond to this violent act with "non-violence" & direct action. *We urge you to select another Dry Cleaners for your clothing.*

The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you.

Select another cleaners for your clothing!

1-15-90

Unity Community of Albany
Rep. John White, Chairman

EXHIBIT "A"

(Certificate of Service Omitted in Printing)

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
FOR THE STATE OF GEORGIA

STATE OF GEORGIA, Appellant, V. THOMAS SCOTT McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM WHITE, Appellees.	: : : : : : : : : : :	CASE NUMBER: S91A0310

STIPULATION

(Filed Jan. 22, 1991)

The parties through their undersigned attorneys hereby agree and stipulate as to the following statement of facts:

For the purposes of the hearing on the State's Motion to prohibit Appellees from exercising their peremptory strikes in a racially discriminatory manner conducted in Dougherty Superior Court on October 22, 1990, before the Honorable Asa D. Kelley, Jr., the parties agreed that Judge Kelley should assume that a one-page statement entitled "Keep the Dream Alive" (*Attachment A* to this Stipulation) was widely distributed among the Black population of Albany, Georgia.

This, the 14th day of January, 1991.

/s/ Robert H. Revell, Jr.
ROBERT H. REVELL, JR.
Attorney for Appellees
Georgia Bar #601337
Post Office Box 70455
Albany, Geogia 31707

/s/ Jesse W. Walters
PERRY, WALTERS
& LIPPITT
JESSE W. WALTERS
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Albany, Georgia 31703

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1-15-90

Unity Community of Albany
Rep. John White, Chairman

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. S91A0310

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Powers v. Ohio*, 59 U.S.L.W. 4268 (April 1, 1991), the United States Supreme Court held that a white criminal defendant had standing to assert the interest of black jurors from being peremptorily struck from the jury for racially discriminatory reasons. "[R]acial discrimination in the disqualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Id.*

That Court added:

> The purpose of the jury system is to impose upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.
>
> *Id.*

It is the position of the State that not only does Georgia's Constitution prohibit a defendant from exercising his peremptory strikes in a racially discriminatory manner, but also the Equal Protection Clause of the Fourteenth Amendment protects jurors from being struck by a criminal defendant for racially discriminatory reasons.

This 9th day of April, 1991.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Senior Assistant Attorney General

PLEASE SERVE ALL
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(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. S91A0310

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Edmondson v. Leesville Concrete Co. Inc.*, ___U.S.___, 89-7743 (June 3, 1991), the United States Supreme Court held that private litigants in a civil case cannot be racially discriminatory in the exercise of peremptory strikes. In a civil trial the exclusion of jurors on account of race violates the prospective juror's equal protection rights. *Id.*

> By enforcing a discriminatory peremptory challenge, the court has not only made itself a party to the biased act but has elected to place its power, property, and prestige behind the alleged discrimination . . . and in a significant way has involved itself with invidious discrimination.

Id.

Clearly, the principles of *Batson* are not limited to the State, but are applicable to a criminal defendant. By exercising his peremptory strikes in a racially discriminatory

manner, a criminal defendant violates both the Georgia Constitution and the Equal Protection Clause of the Fourteenth Amendment.

This 4th day of June, 1991.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Senior Assistant Attorney General

PLEASE SERVE ALL COMMUNICATIONS ON:

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(Certificate of Service Omitted in Printing)

In the Supreme Court of Georgia

Decided: JUL 12 1991

S91A0310. THE STATE V. McCOLLUM et al.

SMITH, Presiding Justice.

McCollum and others were indicted on several counts as a result of an altercation. The state filed a motion asking that the trial court prohibit the defendants from using peremptory strikes in a racially discriminatory matter. The motion was denied and the state appeals.

1. Since the order of the trial court, the United States Supreme Court has decided the case of *Edmonson v. Leesville Concrete Co., Inc.*, 59 USLW 4574, decided June 3, 1991. In that case, the Court held, generally, that the exclusion of any prospective juror by virtue of race would constitute an impermissible injury to that juror. 59 USLW 1578.

2. *Edmonson*, of course, was a civil action. While it may be that the United States Supreme Court may, in another case, prohibit a criminal defendant from exercising peremptory challenges to exclude jurors on the basis of race, it has not yet done so. Bearing in mind the long history of jury trials as an essential element of the protection of human rights, this court declines to diminish the free exercise of peremptory strikes by a criminal defendant.

Judgment affirmed. All the Justices concur, except Hunt, Benham, and Fletcher, JJ., who dissent.

S91A0310. THE STATE v. McCOLLUM et al.

HUNT, Justice, dissenting.

I respectfully dissent because the inescapable conclusion from *Edmondson v. Leesville Concrete Co.*, 59 USLW 4574, decided June 3, 1991, is that no one, not even a criminal defendant, may exercise peremptory strikes so as to exclude jurors in a racially discriminatory manner. *Edmondson* makes is abundantly clear that the exercise of peremptory strikes by any party in any case, pursuant to a state or federal statute, in a state or federal courtroom, is "state" action. And, under *Edmondson*, when that action excludes jurors on the basis of race it may be challenged by the court, by the opposing party, or even by the juror and remedied.

Edmondson, however, is but the latest pronouncement of the federal courts leading to this result. Surely this result was forecast by *Batson v. Kentucky*, itself.[1] While the *Batson* majority sidestepped the issue: "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel," id., 106 S.Ct. at 119, n.12, the dissenting opinion of Chief Justice Burger reasoned:

> [T]he clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike. Once the court has held that

---

[1] 476 U.S. 79 (106 SC 1712, 90 LE2d 69) (1986).

> *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?

(Emphasis in original). 106 S.Ct. at 1738. (Burger, C.J., dissenting). Moreover, as the 5th Circuit Court of Appeals confirmed in *U.S. v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986):

> [E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited.[2]

The rule of *Batson* has proceeded from enforcing the equal protection rights of black defendants to those of white defendants and to those of jurors whose rights may be enforced by the state as well as the defendant. It has expanded from criminal cases to civil cases and from race to gender. One may legitimately question whether peremptory challenges will survive the enveloping application of the rule. Consider the observation of Judge Charles E. Moylan, Jr., writing for the Court of Special Appeals of Maryland in *Chew v. State*, 527 A2d 332 (Md. App. 1987):

> To hold that, in the jury selection process, the equal protection clause is available only to black

---

[2] Cognizable group affiliation may not be limited to those of the same race. In *U.S. v. De Gross*, 913 F2d 1417 (9th Cir. 1990), the 9th Circuit Court of Appeals prohibited the *defendant's* peremptory strikes which were based on gender, holding (a) peremptory challenges based on gender violate the jurors' equal protection rights and those rights may be asserted by the government and (b) a criminal defendant's peremptory challenge is state action.

> defendants deprived of black jurors is philosophically indefensible. Once the protection is moved beyond the narrow base, however, there is not logically defensible way to contain it. Between the absolute abolition of the peremptory challenge, on the one hand, and the absolute refusal to look behind the unfettered use of the peremptory challenge, on the other hand, there may be no tenable middle ground.

Id. at 350.

The majority acknowledges the inevitable but prefers to await further instructions from Washington. In the meantime it reveres the defendants' entitlement to racially-motivated peremptory strikes as though it were of constitutional significance. But peremptory strikes, unlike the prohibition against racial discrimination, enjoy no constitutional foundation. Fundamental to *Edmondson* is the notion that racially-motivated strikes are just another form of racial discrimination which deserves no protection in the administration of justice in our courts. If this is true, it defies all logic to say that such strikes are prohibited only when exercised by the state.[3] I would reverse the denial of the state's motion.

---

[3] This is the position of Justice Scalia's dissent as to the impact of the *Edmondson* majority opinion which he believes is more harmful than helpful to the minority defendant.

> In criminal cases, *Batson v. Kentucky*, [cit.] already prevents the *prosecutor* from using race-based strikes. The effect of today's decision (which logically must

(Continued on following page)

S91A0310. THE STATE V. McCOLLUM et al.

BENHAM, Justice, dissenting.

I must respectfully dissent and must write separately to point out how the majority opinion, by refusing to hold that race is an impermissible consideration in determining a person's fitness for jury service, does unmistakably serious harm to the integrity of the jury selection process.

1. The majority opinion fails to take into consideration an almost unbroken chain of United States Supreme Court opinions leading to the abolition of race as a consideration for jury service: *Strauder v. West Virginia*, 100 U.S. 303 (25 LE 664) (1879); *Swain v. Alabama*, 380 U.S. 202 (85 SC 824, 13 LE2d 759) (1965); *Taylor v. Louisiana*, 419 U.S. 522 (95 SC 692, 42 LE2d 690) (1975); *Batson v. Kentucky*, 476 U.S. 79 (106 SC 1712, 90 LE2d 69) (1986); *Powers v. Ohio*, 499 U.S. ___ (111 SC 1364, 113 LE2d 411) (1991); *Edmonson v. Leesville Concrete Co., Inc.*, 59 USLW 4574, decided June 3, 1991. It is evident from these opinions that in the area of jury service, the trend has been one of inclusiveness rather than exclusiveness.

(Continued from previous page)

> apply to criminal prosecutions) will be to prevent the *defendant* from doing so – so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it is ordinarily more difficult to *prove* race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say the Constitution requires. So in criminal cases, today's decision represents a net loss to the minority litigant. (Emphasis in original).

Edmondson, supra, at p. 4582 (Justice Scalia, dissenting).

In condemning racial discrimination in the jury selection process, the United States Supreme Court has highlighted not only the harm to the parties, but also the harm done to the jury selection process itself by the exclusion of prospective jurors on the basis of race. Justice Kennedy, writing for the majority in *Powers*, supra, 111 SC at 1368, said that *Batson* "was designed to serve multiple ends." One of those ends must be to allow ordinary citizens to participate in the administration of justice, which Justice Kennedy described as "one of the principal justifications for retaining the jury system." Id. He went on to state the holding in that case:

> the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civil life. [Id. at 1370]

The most recent case applying the principles which are apparent in this trend toward inclusiveness is *Edmonson v. Leesville Concrete Co.*, supra, which prohibited race-conscious jury strikes in civil cases. The focus of the court's reasoning in *Edmonson* is on the harm done to jurors and to the justice system, and the court found that the harm was no less because the discrimination occurred in a civil case. Applying the same reasoning, it is obvious that the harm which racial discrimination in selecting a jury does to the integrity of the jury selection process is

just as egregious whether it is done by the state or the defendant in a criminal trial or by the plaintiff or defendant in a civil trial.

2. While I would join Justice Fletcher's dissent to the extent it says *Edmonson* requires racial neutrality in jury selection under the United States Constitution, I would go one step further and also address the issue of the applicability of our state constitution to racially motivated peremptory strikes.

An important question which was raised in the enumerations of error, and briefed and argued by the parties, but not addressed by the majority opinion, and which needs to be addressed here, is whether Art. I, Sec. I, Par. XI, of the Georgia Constitution, which guarantees every accused a trial by an impartial jury, also protects all citizens from racial discrimination in jury service even to the extent of curtailing a defendant's use of racially-motivated peremptory strikes.

The majority's view fails to take into consideration the dynamic aspect of constitutional jurisprudence. Justice John Marshall put the matter of dynamic versus static jurisprudence in proper perspective in *McCulloch v. Maryland*, 17 U.S. 316, 407-415 (4 LE 579) (1819):

> We must never forget that it is *a constitution* we are expounding . . . a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.

Such a crisis was recognized in *Batson v. Kentucky*, supra, when the United States Supreme Court, considering the use of peremptory strikes by the state, employed the Equal Protection Clause of the U.S. Constitution to forbid

the use of racially-motivated strikes by the state, and put in place a legal mechanism for preventing future abuse.

Recognizing the literal correctness of the majority's statement that the U.S. Supreme Court has not yet held that defendants in criminal cases are limited to race-neutral exercises of peremptory challenges, I believe it is incumbent on the highest appellate court in this state, in the exercise of our duty to defend and protect the integrity of the judicial process and, as a necessary part of it, the jury selection process, to look to our state constitution for the appropriate means of achieving that laudable goal. While state courts cannot afford less protection under the state constitution than is required under the United States Constitution, there is no prohibition against the states providing their citizens more protection under the state constitution than is provided under the federal constitution. *Creamer v. State*, 229 Ga. 511 (3) (192 SE2d 350) (1972). The authority to grant that protection in this case is found in Art. I, Sec. I, Par. XI, of our state constitution:

> The right to trial by jury shall remain inviolate . . . In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; . . .

The language of that constitutional provision does not lodge exclusively with the defendant the right to trial by jury. Since the right to a jury trial includes the right to a jury drawn from a fair cross-section of the community (*Taylor v. Louisiana*, 419 U.S. 522 (95 SC 692, 42 LE2d 690) (1975)), then the right to fair and impartial jury selection belongs to the community as well as the defendant.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [*Batson*, supra at 107]
>
> The injury [from discriminatory jury selection] is not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and the democratic ideal reflected in the process of our courts. [*Ballard v. United States*, 329 U.S. 187, 195 (67 SC 261, 91 LE2d 181) (1946)]

Having both the duty and the authority to do so, we must declare it to be offensive to the Constitution of the State of Georgia for any party in a criminal proceeding to use race as a factor in determining a person's fitness for jury service.

3. Whether considered under the Georgia Constitution or under the U.S. Constitution as applied in *Edmonson*, the majority's conclusion that the right of a defendant in a criminal action to use peremptory strikes outweighs the right of prospective jurors to be considered for participation in the judicial system without consideration of race, is untenable. The unfettered exercise of peremptory challenges by either the defendant or the State to strike members of cognizable groups destroys the right to a jury drawn from a representative cross-section of the community. Peremptory challenges are not constitutionally protected fundamental rights – they are but one statutory tool in the effort to reach the constitutional goal of a fair and impartial jury.[4] While OCGA

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[4] "[T]here is no constitutional obligation to allow [peremptory challenges]." *Edmonson*, supra, 59 USLW at 4576.

§ 15-12-165 itself places no restrictions on the right to peremptory challenges, this court has recognized that the right is not without limits: in *Gamble v. State*, 257 Ga. 325 (357 SE2d 792) (1987), this court adopted the reasoning of *Batson* and imposed a restriction of racial neutrality on the state in criminal cases. Although we have in the past given criminal defendants great deference in their use of peremptory strikes, that deferential treatment must be abandoned when it begins to erode the public's confidence in the entire legal process. Racially motivated jury strikes are of such an egregious nature that the jury selection process will suffer irreparable damage if we fail to act.

The public interests in need of protection in this case are the integrity of the jury selection process, the very foundation of the truth-finding process, and the compelling need to encourage citizens to fulfill their citizenship requirements by freely serving on juries without the fear of having racial prejudice visited upon them.

> If the courts allow jurors to be excluded because of group bias, be it at the hands of the State or the defense, they would be willing participants in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it. [*State v. Alvarado*, 221 N.J. Super. 324 (534 A2d 440) (1987)]

Being convinced that the trial court erred in denying the State's motion, I would reverse. Consequently, I must dissent to the judgment of affirmance.

S91A0310. THE STATE V. MCCOLLUM et al.

FLETCHER, Justice, dissenting.

As the majority notes, while the present case was pending in this court, the United States Supreme Court decided *Edmonson v. Leesville Co., Inc.*, 59 USLW 4574, decided June 3, 1991, reversing and remanding 895 F2d 218 (5th Cir. 1990). *Edmonson* holds that

> a private litigant in a civil case may [not] use peremptory challenges to exclude jurors on account of their race. . . . [because] the race-based exclusion violates the equal protection rights of the challenged jurors.

Edmonson, 59 USLW at 4575.

As I interpret *Edmonson*, the United States Supreme Court has determined that the process of jury selection constitutes state action in that the objective of the selection process is determination of representation on a governmental body and "[t]he fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised." *Edmonson*, 59 USLW at 4577. Accordingly, the restrictions placed upon the exercise of racially based peremptory jury strikes by the equal protection component of the Fifth Amendment's Due Process Clause would appear to apply to all parties in both civil and criminal cases.[5]

---

[5] In his dissenting opinion, Justice Scalia points out that the majority decision in *Edmonson* "logically must apply to criminal prosecutions." *Edmonson*, 59 USLW at 4582.

Based upon the aforesaid interpretation of the holding in *Edmonson*, I feel compelled to apply that holding to the present case.[6] In so doing, I would find that the trial court erred in denying that state's motion to have appellees prohibited from using their peremptory strikes in a racially discriminatory manner and would reverse and remand the case to the trial court.

---

[6] As it seemed apparent that there is no state action involved in an accused's exercise of his or her peremptory strikes, my initial observation concerning this case was more in line with the majority opinion and with Justice O'Connor's dissenting opinion in *Edmonson*, 59 USLW at 4579-4582. However, it now appears that a determination has been made that the rights of a defendant, whether a private litigant or an accused in a criminal trial, are subservient to the rights of prospective jurors who are not on trial and whose life, liberty, and property are not at stake.

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	*	
Appellant,	*	
v.	*	CASE NO.
THOMAS McCOLLUM,	*	S91A0310
WILLIAM JOSEPH McCOLLUM,	*	
and ELLA HAMPTON McCOLLUM,	*	
Appellees.	*	

STATE'S MOTION FOR REHEARING

The State respectfully asserts that the majority opinion conflicts with the holding of *Edmondson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 59 L.W. 4574 (1991), that the racially discriminatory exclusion of jurors by peremptory strikes violates the jurors; Fourteenth Amendment right to equal protection under the law.

Moreover, this Court has recently held that our State Constitution offers broader protection than does the United States Constitution. *Denton v. Con-Way Southern Express*, 261 Ga. 41, 45 (1991); *see, e.g., Harris v. Entertainment Systems, Inc.*, 259 Ga. 701 (1989). If this Court does not wish to reach the federal constitutional issue, the discriminatory exercise of peremptory strikes is still prohibited by the Georgia Constitution. *State v. McCollum*, ___ Ga. ___ (1991) (J. Benham dissenting).

Surely the time has passed when citizens of this state must seek the protection of the federal courts against racially discriminatory practices. With this case, this Court has the opportunity to forcefully demonstrate that

Georgia Courts, applying the Georgia Constitution, will likewise preserve and protect the integrity of the jury selection process.

This 19th date of July, 1991.

Respectfully submitted,

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SUPREME COURT OF GEORGIA

ATLANTA JULY 24, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91A0310

THE STATE V. THOMAS SCOTT MCCOLLUM, ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunt, Benham and Fletcher, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the United States Constitution prohibit a white criminal defendant from exercising his peremptory strikes in a racially discriminatory manner?

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PETITIONER'S BRIEF ON THE MERITS

OPINION BELOW

The Georgia Supreme Court's decision is reported as *State v. McCollum*, 261 Ga. 473, 405 S.E.2d 688 (1991).

JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review a state criminal appeal.

CONSTITUTIONAL PROVISION

Fourteenth Amendment, United States Constitution:

> . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws. . . .

STATEMENT OF THE CASE

Respondents Thomas McCollum, William McCollum, and Ella McCollum – who are white – were indicted on August 10, 1990, for several assaultive crimes against Jerry and Myra Collins, who are black (J.A. 2-5, 6, 14).

According to the latest published census, Dougherty County's population is 43% black (J.A. 9-10). In Georgia, forty-two jurors are empaneled in a felony trial. O.C.G.A. § 15-12-160. Since aggravated assault carries a potential punishment of twenty years imprisonment, O.C.G.A. § 16-5-21, the McCollums will have twenty peremptory strikes and the State ten. O.C.G.A. § 15-12-165.

The State filed a pretrial motion to prohibit the McCollums from exercising their peremptory strikes in a racially discriminatory manner (J.A. 6-8). The State pointed out that if the jury panel at the McCollums' trial mirrors the racial makeup of Dougherty County, there will be eighteen black persons on the panel (J.A. 7). Therefore, the McCollums potentially will be able to remove with their twenty peremptory strikes all black persons from the panel and be tried by an all-white jury (J.A. 7).

The trial court denied the State's motion but certified the issue for immediate review (J.A. 14-15). The Georgia Supreme Court granted an interlocutory appeal (J.A. 16-17), but on July 12, 1991, in a 4-3 decision, affirmed the trial court (J.A. 46-57). *State v. McCollum*, 261 Ga. 473, 405 S.E.2d 688 (1991).

This Court granted Georgia's petition for writ of certiorari on November 4, 1991.

SUMMARY OF THE ARGUMENT

A juror's Fourteenth Amendment right to equal protection is violated when a criminal defendant uses a peremptory strike to remove that juror for racially discriminatory reasons. The prosecutor, on behalf of the State, has standing to object to the criminal defendant's discriminatory exclusion of the jurors.

Racial discrimination by a criminal defendant within the courtroom calls into question the fairness and integrity of the criminal justice system and prevents jurors, merely because of their race, from participating in jury service, one of our significant democratic institutions.

ARGUMENT

A. THIS CASE PRESENTS THE OPPORTUNITY FOR THIS COURT TO ELIMINATE FURTHER RACIAL DISCRIMINATION IN JURY SELECTION.

Earlier this year this Court noted there has been "over a century of jurisprudence dedicated to the

elimination of race prejudice within the jury selection process." *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S. Ct. 2077, 2081-82, 114 L.Ed. 2d 660, 672 (1991). Less than six years ago this Court ruled that a prosecutor's racially discriminatory exercise of peremptory strikes to remove black jurors from the panel violates a black defendant's Fourteenth Amendment right to equal protection. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Justice Powell's opinion specifically did not reach the issue of whether defense counsel is similarly limited in the exercise of peremptory strikes. *Batson v. Kentucky*, 476 U.S. at 89 n. 12, 106 S.Ct. at 1719 n. 12, 90 L.Ed.2d at 82 n. 12.

Two dissenters in *Batson*, then Chief Justice Burger joined by the present Chief Justice, asked rhetorically that if prosecutors are limited, can this Court rationally hold that defendants are not. *Batson v. Kentucky*, 476 U.S. at 126, 106 S.Ct. at 1738, 90 L.Ed.2d at 107. In his concurring opinion, Justice Marshall stated:

> Our criminal justice system "requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

Batson v. Kentucky, 476 U.S. at 107, 106 S.Ct. at 1729, 90 L.Ed.2d at 95.

This Court has now ruled that in the trial of a white criminal defendant, a prosecutor is prohibited from excluding black jurors on the basis of race. *Powers v. Ohio*, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Then, approximately two months after *Powers*, this Court

decided that in a civil case, private litigants cannot exercise their peremptory strikes in a racially discriminatory manner. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). In his dissent Justice Scalia stated, "The effect of today's decision . . . logically must apply to criminal prosecutions. . . ." *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2095, 114 L.Ed.2d at 689.

Although the panel decisions have been vacated by the granting of rehearings en banc, two federal circuits had prohibited criminal defendants from exercising peremptory strikes in a racially discriminatory manner. *See, e.g., United States v. De Gross*, 913 F.2d 1417, 1420 (9th Cir. 1990), *reh. granted* 930 F.2d 695 (1991); *United States v. Greer*, 939 F.2d 1076, 1086 (5th Cir. 1991), *reh. granted* ___ F.2d ___ (Dec. 3, 1991).

Therefore, the question left unanswered in *Batson* is squarely presented in the present case. The McCollums, who are white, have been indicted for assaultive crimes against black victims. Counsel for the McCollums have clearly indicated their intention to use their peremptory strikes in a racially discriminatory manner, arguing that the circumstances of their case give them the right to exclude black citizens from participating as jurors in the trial of this case (J.A. 35-37). The Georgia Supreme Court upheld the "right" of McCollums' counsel to exercise their peremptory strikes in this fashion. *State v. McCollum*, 261 Ga. 473, 405 S.E. 2d 688 (1991).

Georgia submits that the McCollums' position is unconstitutional. With this case, this Court can further

advance the elimination of racial discrimination within the jury selection process.

B. THE STATE ATTORNEY GENERAL, ON BEHALF OF THE STATE OF GEORGIA, HAS STANDING TO RAISE THE CONSTITUTIONAL CLAIMS OF BLACK JURORS SUBJECTED TO RACIAL DISCRIMINATION IN THE JURY SELECTION PROCESS.

This Court has unequivocally declared that, under the Equal Protection Clause, individual jurors "possess the right not to be excluded from [a petit jury] on account of race." *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1370; 113 L.Ed.2d at 424. In this case, absent relief from this Court, black potential jurors will be deprived of that right.

This Petition is brought, not by black potential jurors, but by Michael J. Bowers, Attorney General, on behalf of and in the name of the State of Georgia. It is submitted that Petitioner has standing to bring this case on behalf of the black citizens of Georgia who are the targets of racial discrimination in this case.

In *Powers v. Ohio, supra*, this Court held that a white criminal defendant had standing to raise the equal protection rights of black jurors wrongfully excluded from jury service. There was cognizable injury in *Powers* because of the damage done, not to the defendant as an individual, but to the criminal justice system. *Powers v. Ohio*, 500 U.S. at ___, 111 S.Ct. at 1371, 113 L.Ed.2d at 425-26.

The trial court and the Georgia Supreme Court have both given approval to the announced intention of

Respondents' counsel to discriminate against black Georgia citizens. The effect of the decision of the Georgia Supreme Court is to institutionalize this form of racial discrimination in Georgia law. Moreover, the damage to the criminal justice system is just as great when the defendant uses his peremptory strikes in a racially discriminatory fashion, as when a prosecutor does so. Where the community judges that criminal cases are decided by jurors who are unrepresentative and unfair, an acquittal perceived to be tainted by racial discrimination is just as damaging as an unfair conviction would be.

In the McCollums' case there has not been a jury verdict. However, once the State received an adverse pretrial ruling in the trial court (J.A. 14-15), the only way the State could prevent the racial discrimination was to seek interlocutory review. If the McCollums' case had gone to trial and there had been an acquittal, jeopardy would have attached and the State could not appeal. Even if there were to have been a conviction of the McCollums, the State as appellee could not have appealed an adverse trial court ruling permitting racially discriminatory peremptory strikes by a criminal defendant.

In *Powers v. Ohio, supra*, this Court held that the relationship of a white criminal defendant to potential jurors is sufficiently close for the defendant to assert the equal protection rights of the excluded black juror. Certainly the prosecutor has a relationship to potential jurors that is equally as close as that of the white criminal defendant. The Petitioner's relationship to potential jurors in this case is, it is submitted, *closer* than the relationship approved in *Powers*. Art. I, § 1, ¶2 of the 1983 Georgia Constitution establishes the relationship between

Georgia citizens and their state government: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

In addition, the McCollums are being prosecuted by a government official, the Attorney General, on behalf of and in the name of the State. In Georgia the Attorney General is a statewide elected official. Ga. Const. Art. V, § 3, ¶ 1. Georgia's "[p]ublic officers are the trustees and servants of the people. . . . " Ga. Const. Art. I, § 2, ¶ 1. The relationship of Petitioner to black potential jurors is sufficiently close for the Attorney General to assert, on behalf of the State, the equal protection rights of these persons.

Although individuals excluded from jury service on the basis of their race have a right to bring suit on their own behalf, the "barriers to such a suit by an excluded juror are daunting." *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1373, 113 L.Ed.2d at 427. As a practical matter, unless a prosecutor has standing to challenge the defense's use of peremptory strikes in a racially discriminatory manner, it is likely that the practice will go unchallenged. It is both legally consistent and fair for a prosecutor (in this case the State Attorney General), whose duty it is to prosecute for the violation of crimes as defined by the people's elected representatives, to have standing, on behalf of and in the name of the State, to challenge a criminal defendant's racially discriminatory exercise of peremptory strikes.

C. THE USE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER INVOLVES STATE ACTION, VIOLATES THE EQUAL PROTECTION RIGHTS OF THE JURORS AND UNDERMINES THE PUBLIC'S CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

The McCollums, Respondents in this case, successfully asserted in the Georgia Supreme Court that the circumstances of their case give them the right to exclude black citizens from participating as jurors in the trial of this case (J.A. 35-37). This position is untenable in law, logic or policy. The use of peremptory strikes in a racially discriminatory manner by a white criminal defendant violates the United States Constitution, and undermines public confidence in our criminal justice system. Such a practice deprives citizens, on the basis of their race, of their important right to participate in the administration of justice. This practice reflects discredit on our legal system in that it creates opportunities for the outcome of criminal cases to be manipulated, so that "justice" may vary depending upon the race of the defendant and of the victim.

"The peremptory challenge has very old credentials." *Swain v. Alabama*, 380 U.S. 202, 212, 85 S.Ct. 824, 831, 13 L.Ed.2d 759, 768 (1965). Although peremptory challenges are rarely used in England today, their history in English law goes back several hundred years. *Swain v. Alabama*, 380 U.S. at 213, 85 S.Ct. at 832, 13 L.Ed.2d at 769, Yet this Court has also noted that *peremptory challenges are not of constitutional origin. Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2083, 114 L.Ed.2d at 673; *Gray v. Mississippi*, 481 U.S. 648, 663, 107 S.Ct. 2045,

2054, 95 L.Ed.2d 622, 636 (1987); *Swain v. Alabama*, 380 U.S. at 219, 85 S.Ct. at 835, 13 L.Ed.2d at 772.

In Georgia, peremptory strikes are statutory in origin. This law is presently codified at O.C.G.A. § 15-12-165, a statute which has remained essentially unchanged in Georgia law since 1833. *See* 1833 Ga. Laws, Cobb's 1851 Digest, p. 835. Despite this lengthy statutory history in Georgia, the peremptory strike has no state constitutional foundation. *See State v. McCollum*, 261 Ga. at 475, 405 S.E.2d at 690 (Hunt, J. dissenting.)

No private party can exercise peremptory challenges without overt, significant assistance of the trial court, and the exercise of these strikes involves State action. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2084-85, 114 L.Ed.2d at 675. The State summons the jurors and subjects the jurors to public scrutiny and examination during the voir dire. *Id.* Once the peremptory strike, which is granted by State statute, is exercised, the trial court excuses the juror, thus ultimately denying the juror the opportunity to serve on the petit jury. *Id.*

When any person is excluded from jury service solely on the basis of his or her race, whether by the prosecution or the defense, that person is deprived of an important right of citizenship. When the mechanism for this discrimination is a peremptory strike in a court of law, this deprivation of rights is perpetrated under state auspices and with the state's imprimatur. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2084-85, 114 L.Ed.2d at 675-76. It is no less a violation of

the constitutional rights of potential jurors if this deprivation is instigated by the defense rather than the prosecution.

Several State appellate courts have ruled that their respective state constitutions prohibit a criminal defendant from exercising peremptory strikes in a racially discriminatory manner. *See, e.g., People v. Kern*, 555 N.Y.2d 647, 655, 554 N.E.2d 1235, 1243 (1990), *cert. denied*, 111 S.Ct. 77 (1990); *State v. Neil*, 457 So.2d 481, 487 (Fla. S.Ct. 1984); *People v. Pagel*, 186 Cal App. 3d Supp. 1, 232 Cal. Rptr. 104, 106-07 (1986), *cert. denied*, 481 U.S. 1028 (1987); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, 517 n.35 (1979), *cert. denied*, 444 U.S. 881 (1979). Georgia has been able to locate only one appellate court decision – its own – which has ruled a criminal defendant is not prohibited from exercising his peremptory strikes in a racially discriminatory manner.

Because peremptory strikes have such a long history, an argument can be made that the availability of peremptory strikes is a significant part of what is conceived of as a "fair trial." However, it is submitted that it would be an affront to justice to argue that the notion of a "fair trial" includes the right to discriminate against a group of citizens based upon their race. In fact, it is difficult to envision a practice that would be more at odds with the concept of "fairness" in a court of law.

A criminal defendant in Georgia is granted significant federal and state constitutional protection. He is presumed innocent, and the burden is upon the State to prove his guilt beyond a reasonable doubt. The jury must be impartial. The defendant cannot be forced to testify,

nor can the State comment on his failure to testify. Evidence gained from searches and seizures or from custodial interrogation may be suppressed or excluded if there are Fourth, Fifth or Sixth Amendment violations. The State must disclose exculpatory evidence to the defendant along with any promises or inducements to the State's witnesses. Before a defendant can be convicted, there must be a unanimous verdict of guilty by twelve jurors. These protections ensure a fair trial; the notion of a fair trial does not include the right to engage in racial discrimination. Defense counsel is limited to "legitimate, lawful conduct," *Nix v. Whiteside*, 475 U.S. 157, 166, 106 S.Ct. 988, 994, 89 L.Ed.2d 123, 134 (1986); and should not be permitted to engage in racially discriminatory peremptory strikes.

When a juror is peremptorily struck for a racially discriminatory reason, the juror is unfairly deprived of the opportunity to participate in one of our significant democratic institutions. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. at ___, 111 S.Ct. at 2082, 114 L.Ed.2d at 672. A person's race is irrelevant to the person's fitness as a juror. *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81.

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.

Powers v. Ohio. 499 U.S. at ___, 111 S.Ct. at 1368, 113 L.Ed.2d at 422. Just as a juror's equal protection rights are violated when the prosecutor or private litigants strike the juror for racially discriminatory reasons, the juror's rights are similarly violated when the criminal defendant

exercises the peremptory strike for racially discriminatory reasons.

If systematic discrimination against members of a particular race is tolerated in jury selection, damage is done to the public's confidence in the integrity of our system of justice. Racial discrimination in the courtroom raises serious questions as to the fairness of the proceedings and undermines public confidence in the criminal justice system. *Powers v. Ohio*, 499 U.S. at ___, 111 S.Ct. at 1371, 113 L.Ed.2d at 425; *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81. Just as public confidence in criminal justice was undermined by a conviction in a trial where racial discrimination occurred in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.

Whether the result of the trial is a conviction or acquittal, the public is entitled to the legitimate expectation that the trial was fair and the jury was biased neither in favor of the State nor the defendant. In the trial over the highly publicized "Howard Beach incident" the white defendants were convicted of second degree manslaughter and first degree assault of minority victims. *People v. Kern*, 555 N.Y.S.2d at 658, 554 N.E.2d at 1246. In a case of such a nature, emotions in the affected community will inevitably be heated and volatile. Public confidence in the integrity of the criminal justice system is an absolutely essential element in preserving community peace and cohesion in such cases. In the "Howard Beach" prosecutions, New York courts did not allow the white defendants to exercise their strikes in a racially discriminatory manner. Had the policy of the New York courts been

otherwise, the convictions on lesser included offenses might well have been the cause of increased alienation and hostility among segments of the affected community. The "Howard Beach incident" illustrates why there should be no tolerance of the practice of racial discrimination by means of peremptory strikes. Such a practice has real and tragic potential for making the criminal justice system a divisive force in society, rather than a unifying one.

Under the Sixth Amendment, a criminal defendant is entitled to a trial "by an impartial jury." The defendant is not entitled under the Sixth Amendment to trial before a jury chosen for its racial characteristics. The criminal defendant is not entitled under the Sixth Amendment to racially discriminate against other citizens, thereby depriving them of their constitutional rights. The guarantee of a fair trial protects both the defendant and society. The Sixth Amendment is not an instrument the defendant may use to save himself by harming society. The guarantee of a fair trial simply does not give a defendant a "right" to exercise his peremptory strikes in a racially discriminatory manner.

CONCLUSION

Georgia respectfully requests this Court reverse the Georgia Supreme Court and rule that a criminal defendant is constitutionally prohibited from exercising his peremptory strikes in a racially discriminatory manner.

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QUESTION PRESENTED

Does the United States Constitution prohibit a criminal defendant from exercising peremptory jury challenges based upon race?

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SUMMARY OF ARGUMENT

The Fourteenth Amendment does not preclude the exercise of peremptory challenges by the accused based on racial considerations. Because of the unique adversarial relationship of the criminal defendant and his or her attorney to the state, they are not state actors while in the exercise of the defendant's peremptory challenges, a traditional function of counsel. In addition, the state prosecutor does not have standing to raise the Fourteenth Amendment claims on behalf of the juror.

The right of an accused under the Sixth Amendment to a speedy and public trial by an impartial jury demands that the accused be allowed to exercise peremptory challenges without restrictions as was clearly intended by Congress and state legislative bodies in providing for such challenges. Hence, a defendant should not be barred from using peremptory challenges to remove a juror of another race because of possible racial bias against the defendant. To hold otherwise will subject an accused to trial by jurors who are or may be biased against him or her. In addition, the facts of the instant case demonstrate that the intentional injection of racial considerations into the case by the alleged victims and leaders of their race makes the peremptory challenge a necessary means by which the accused may attempt to eliminate any such bias from the jury panel.

ARGUMENT

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PRECLUDE THE EXERCISE OF A PEREMPTORY CHALLENGE BY THE CRIMINALLY ACCUSED ON THE BASIS OF RACE.

A criminally accused cannot in fairness, or by any sort of sound logic, be considered a state actor in exercising his constitutional and legal right to adequately defend his or her liberty or life against a charge in a court of law that he or she has committed a crime. A jury will decide the guilt or innocence of the accused and thus the loss of liberty or life. It cannot be reasonably concluded that the defendant's action in using peremptory challenges to eliminate from the jury those jurors whom the defendant apprehends will be biased against him or her constitutes state action. This is true even though the peremptory challenges are granted to him or her by the state; his or her trial is conducted in a court created by the state; in a building owned by the state; and the judge, an officer of the state, administratively but without the exercise of any discretion, requires the challenged juror to step aside. A contrary ruling would deprive the concept of state action of any significant and intelligible meaning. Such a conclusion is not dictated or justified by this Court's holdings in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. ___, 114 L.Ed.2d 660, 111 S.Ct. ___ (1991); or *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 (1986).

Batson holds that, in a criminal case, the district attorney, an officer and alter ego of the state in the prosecution of the defendant, cannot, on behalf of the state, use peremptory challenges to eliminate jurors based upon the

juror's race. This was clearly a case involving a state actor, and therefore state action.

In *Polk County v. Dodson*, 454 U.S. 312, 70 L.Ed.2d 509, 102 S.Ct. 445 (1981), this Court held that a public defender does *not* act under color of state law when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding and consequently was not liable for alleged violations under 42 U.S.C. § 1983 of the defendant's constitutional rights.

This Court now has before it the issue of whether a privately retained defender is acting under color of state law when representing a nonindigent defendant in a state criminal proceeding, in the context of exercising peremptory jury challenges.

In *Polk* the Court acknowledged that lawyers representing clients are not state actors by virtue of being officers of the court within the meaning of Section 1983, and emphasized the *adversarial relationship* between the state and the defendant as opposing parties in a criminal trial:

> . . . In our system a defense lawyer characteristically opposes the designated representatives of the state. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the state or in concert with it, but rather by advancing the undivided interest of his client. This is essentially a private function, traditionally filled by retained counsel for which the state office and authority are not needed. *Polk*, supra, at 516-517.

The Court further held with regard to *state action* that the status of the public defender is not distinguishable from the private attorney in the representation of his client:

> But a defense lawyer is not, and by the nature of his function, cannot be the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States*, 432 F.2d 730 (CA31970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. *Polk*, supra, at 518.

If the state must respect the professional independence of a public defender which it employs in the representation of the defendant, and the public defender in that representation is not acting for the state because of the public defender's adversarial and wholly antagonistic relationship to the state, then this Court cannot logically hold that the defendant in a criminal case or his or her attorney is a state actor, and the action of the attorney in exercising the defendant's peremptory challenges is state action without overruling *Polk*.

To hold otherwise would render a state criminal defendant's right to " . . . the guiding hand of counsel at every step in the proceeding against him . . . " meaningless. *Gideon v. Wainwright*, 372 U.S. 335 at 345, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); Sixth Amendment.

> Implicit in the concept of a guiding hand is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. *Polk*, supra, at 519.

Clearly, the right of a defendant to defend himself in a court of law is permanently compromised when his counsel is deemed to owe a duty to the state in the manner and means in which the peremptory challenge is exercised but at the same time to owe to the client the guiding hand at every step in the proceedings against him to protect him from the state.

While the Court in *Polk* acknowledges that a public defender may engage in activities that might be deemed state action, the examples cited are activities clearly outside the scope of the traditional functions of representation of clients, i.e., hiring and firing decisions on behalf of the state and certain administrative and possibly investigative functions. *Polk*, supra, at 520.

Much has been written about the traditional and longstanding importance of the peremptory challenge and its use in the defense of criminal defendants. Clearly, under the rationale and holding of *Polk*, the criminal defense attorney is performing a traditional function of counsel within the adversarial process against the state while exercising a peremptory challenge in striving to provide for his client a jury free from those who may be biased against him. The attorney cannot and should not be deemed a state actor with a duty to the state and at the same time properly represent his client.

The defense attorney cannot serve two masters – the state and his client. If a defense attorney in representing a defendant accused of a crime is a state actor in exercising peremptory challenges, then the attorney must be considered a state actor in every phase of the trial, which on its face cannot be correct, theoretically or otherwise.

In *Edmonson* this Court had before it the issue of "whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges." Supra, at 674. That was a civil case in which the black plaintiff accused the corporate defendant of exercising race-conscious peremptory challenges.

In *Edmonson* the Court distinguished the ruling in *Polk* because the public defender occupied an adversarial relationship to the state (just as is true with respect to a private attorney representing a defendant in a criminal case and even more so since the private attorney *is not hired by the state* and *the cost of the attorney's services are paid by the defendant*) and was therefore not a state actor whereas the attorneys in *Edmonson* had no such adversarial relationship.

With regard to the concept of state action, there is a significant difference, insofar as relationship to the state is concerned, between parties engaged in the trial of a civil case and a defendant in a criminal case, defending a criminal charge by the state. See *Polk*, supra.

In a civil case, the parties, with regard to their private legal duties and obligations, are not in a litigious or adversarial and antagonistic relationship with the state, but are merely utilizing the privileges accorded them by the state as a means of settling their differences.

The ruling that the parties in a civil action, in exercising their peremptory challenges, "in all fairness must be deemed government actors" (*Edmonson*, supra) cannot logically be applied to a defendant in a criminal case. The government is a party acting for itself, and, in any view, is the defendant's staunch and bitter adversary. In no

realistic sense, whether it be in the use of peremptory challenges, introducing evidence or otherwise participating in the trial, is the defendant a state actor or his conduct state action. Instead of the harmony between the parties and the state, as in civil actions, there is complete discord and strife between the criminal defendant and the state, and there is no reasonable theory upon which it can be said that the defendant, in protecting his liberty and perhaps his life, is acting for the state.

Edmonson recognized that the civil litigant's status as a state actor is determined through a careful analysis of the facts of each case, "a fact-bound inquiry," and applied the state actor analysis of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982). *Lugar* held that the action of a creditor in suing upon a prejudgment attachment under which the debtor's property was seized by the sheriff, a state officer, constituted state action. Under the second phase of the analysis, the following criteria were applied to hold the private litigants to be state actors in the exercise of their peremptory challenges:

1. The extent to which the actor relies on governmental assistance and benefits;

2. Whether the actor is performing a traditional governmental function; and

3. Whether the injury caused is aggravated in a unique way by the incidence of governmental authority.

We submit that it cannot be fairly said that in the trial of a criminal case either the defendant or his attorney

relies on governmental assistance and benefits or is performing a traditional governmental function in resisting the government's accusation. In no sense is the use of a peremptory challenge to eliminate a juror on any ground an injury to the juror which is aggravated in a unique way by the incidence of governmental authority. Of course, the defendant has certain constitutional rights bestowed upon him and certain legislative rights apparently thought by those bodies as being rights that he should have the right to exercise himself, but they cannot be classified as "governmental assistance and benefits."

The ruling sought by the state in this case finds no support from, but is contrary to, the underlying theory of state action as found in the court's rulings that a court should not use its judicial power to enforce racially restrictive covenants as in *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441 (1948); or that the actions of the executrix of an estate in providing notice to creditors that they might file claims could be fairly attributable to the state because those private actors were *compelled and required* to take certain actions by the state probate court as in *Tulsa Professional Collection Services, Inc., v. Pope*, 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988).

It is significant that no criminal defendant is compelled by the state to exercise a peremptory challenge. Such an exercise is always a private strategic decision made solely by the accused and the attorney based upon the facts and circumstances of the case.

The involvement of the government in the criminal defendant's exercise of peremptory challenges falls far

short of the "interdependence or joint participation" between the private actor and the state which was described in *Burton v. Wilmington Park Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961).

The standard and criteria used to determine whether actions by a private actor constitute action under color of state law should be governed by this Court's holding in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 42 L.Ed.2d 477, 95 S.Ct. 449 (1974):

> Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into state action . . . *Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the state does not make its action in doing so state action for purposes of the Fourteenth Amendment*. 419 U.S. 345, 357 (emphasis added).

Because the government judge merely administratively acquiesces in the criminal defendant's private decision to exercise a peremptory challenge, the traditionally required "overt, significant participation" by the government is totally lacking in the exercise of a peremptory challenge by a criminal defendant.

If the exercise of a peremptory challenge by defense counsel is deemed to be state action, then any of the "traditional functions" of defense counsel could fall under attack as state action constitutionally offensive to

jurors, witnesses, or the public at large.[1] Such a result will clearly undermine the criminal adversary process.

The actor in the instant case, the criminal defense attorney, is argued by petitioner to be performing a traditional governmental function in the exercise of a peremptory challenge because he or she exercises a statutory say-so in selecting the jury. The theory advanced is that since the ultimate decision by the jury will constitute the authority of the government, then somehow the decisions of the accused and his or her attorney in determining

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[1] For example, in the event this Court extended the state actor analysis of *Edmonson* to encompass the criminal defendant during his adversarial battle with the state in the criminal trial, could not jurors or witnesses complain of an Equal Protection violation when asked questions by defense counsel to determine racial bias in the case? We know that the rules and regulations permitting and governing voir dire are statutory; are asked in a public courtroom during a trial; and, the judge participates by supervising, or conducting, or limiting the voir dire. Could a criminal defense attorney then be deemed a state actor during opening statement, the questioning of witnesses, or the closing argument because such actions are pursuant to rules and regulations provided by law, conducted in a public courtroom during a trial, and done by tacit permission and authority of the trial judge?

Assume that a defense attorney peremptorily challenges and excuses a juror based upon racial considerations but the prosecutor interposes no objection thereto. Would the excluded juror have a cause of action against the defense attorney under 42 U.S.C. § 1983 for damages for the alleged violation of the juror's constitutional rights? In the context of such an action, what would be the controlling principle, whether the defendant reasonably believed in good faith that the juror might be biased against him or her; or whether the juror was in fact biased against the defendant?

selection of the jury are therefore absorbed into the decision of the government.

The Court states that in the context of a civil trial the sole purpose of the peremptory challenge is to permit litigants to *assist the government* in the selection of an impartial jury. *Edmonson*, supra, at 674. While this may be arguably true in the civil context, such a concept does not exist in the context of a criminal trial. On the contrary, the criminal defense attorney is in mortal combat against the government in all phases of trial, including jury selection. In practice, during jury selection the government would be inclined to exclude those jurors which the criminal defendant would prefer, and the criminal defendant inclined to exclude those jurors which the government would prefer.

To say that the criminal defendant is a state actor because he or she is assisting the government at any phase of the criminal trial process is inconsistent with the criminal adversary system. This Court has clearly so indicated by its ruling in *Polk* where it was held that a public defender is not to be considered a state actor. Then, in *Edmonson*, a civil case in which the parties were held to be state actors in exercising their peremptory challenges and would therefore violate a juror's Fourteenth Amendment rights by challenging a juror because of his race, the Court distinguished *Polk* on the grounds that the public defender in *Polk* was in an adversarial position with the government. *Edmonson*, supra, at 677 and 687. Hence, this Court in effect has *twice ruled* that in a criminal trial, a person involved therein in an adversarial relationship with the government is not a state actor.

We respectfully submit that if this Court holds an attorney representing a defendant charged with a crime to be a state actor and his actions in using the defendant's peremptory challenges state action, predicated on the idea that the attorney is exercising (by choice and not by compulsion) rights granted by the state and that the state provides for a trial in which the challenges are exercised, then the Court will have destroyed the now necessary element of state action with respect to rights arising under the Fourteenth Amendment since every private citizen who exercises a right granted under a statute in connection with the enforcement of his or her rights will thereby logically become a state actor and his or her actions state action.

Finally, the state prosecutor is without standing to assert the claims of a juror in a criminal trial. Basically, the state prosecutor suffers no "injury in fact" by virtue of the exercise of a peremptory challenge by a criminal defendant with relation to a juror. The state is deprived of no right. In addition, neither Congress nor the state of Georgia has conferred standing upon the state prosecutor to raise such claims. See generally *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed.2d 636, 92 S.Ct. 1361 (1972); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 70 L.Ed.2d 700, 102 S.Ct. 752 (1982).

THE RIGHT OF THE ACCUSED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO A SPEEDY AND PUBLIC TRIAL BY AN IMPARTIAL JURY DEMANDS THAT THE ACCUSED CONTINUE TO EXERCISE THE USE OF PEREMPTORY CHALLENGES WITHOUT RESTRICTIONS.

The Sixth Amendment to the United States Constitution and the equivalent provision of the Georgia Constitution (Article I, Section I, paragraph XI) guarantee that the *defendant* shall have a public and speedy trial by an impartial jury. Such a requirement is clearly implied in the Fourteenth Amendment. As this Court said in *Powers v. Ohio*, 499 U.S. ___, 113 L.Ed. 411 at 426, 111 S.Ct. 1364 (1991), "Jury selection is the primary means by which a court may enforce a *defendant's* right to be tried by a jury free from ethnic, racial or political prejudice." *Rosales-Lopez v. United States*, 451 U.S. 182, 68 L.Ed.2d 22, 101 S.Ct. 1629 (1981); *Ham v. South Carolina*, 409 U.S. 524, 35 L.Ed.2d 46, 93 S.Ct. 848 (1973); *Dennis v. United States*, 339 U.S. 162, 94 L.Ed. 1364, 70 S.Ct. 799 (1950); or predisposition about the defendant's culpability, *Irving v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961); *Gomez v. United States*, 490 U.S. 858, 104 L.Ed.2d 923, 109 S.Ct. 2237 (1989) (emphasis added).

In our imperfect world racial bias of one race toward another still exists.[2] Judicial decree will not obliterate that

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[2] Race is a biological fact. Racism, the inherent characteristic of which is the treatment of one race or another as being inferior, subordinate and not worthy of the same privileges and rights of some other race, is clearly despicable, unworthy

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fact. See generally *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880), and *Batson*.

An *impartial* jury is defined as a jury "not partial; unprejudiced"[3] and as "not partial, without prejudice, not

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and unacceptable. This clearly is, and should be, the attitude of our judicial and governmental system. Nevertheless, among all races there undeniably and understandably exists racial pride, loyalty and fellowship. The recognizable preference for one's own ethnic group in certain contexts and settings unavoidably spawns unfriendliness, discord, enmity and hostility between races, resulting, whenever a choice must be made, in the very human tendency of a member of one race unwittingly to favor his or her race.

In the situation of a criminal defendant who is engaged in the most important contest in which he will ever engage, a struggle to preserve his or her liberty and perhaps his or her life, a rule that forbids him or her from weighing the foregoing considerations in using peremptory challenges most certainly deprives a defendant of what should be his right not to be placed even in the likelihood of being tried by jurors who are biased against his or her race. Such contemplative and careful use of his or her challenges is one of, if not the most important defensive measures a defendant has to protect himself or herself against an unjust conviction, and such a course of conduct does not amount to invidious discrimination.

It may be that under the contrary ruling sought by the state, justice will be blindfolded as to racial and ethnic considerations in the context of selecting a jury; nevertheless, justice will also be blind as to the right of a defendant to a constitutionally fair trial by jurors who, by virtue of racial attitudes, may be incapable of giving the defendant a fair trial.

[3] William Morris, ed., American Heritage Dictionary of the English Language, New York, New York, p. 659.

taking sides, unbiased."[4] A *partial* jury is defined as ". . . 2. Favoring one person or side over another or others; biased; prejudiced,"[5] and "affecting only a part of, not total, inclined to favor unreasonably."[6]

If the defendant's right to an impartial jury does in fact mean that an accused has a constitutional right to not be tried by a juror who is biased against him or her, or even whom the defendant believes for specific reasons may be so biased against him or her, then there must be an appropriate means, such as peremptory challenges, for the accused to implement his constitutional right. The defendant must have some reasonable, workable means of protecting that right.

An impartial jury doesn't simply appear by the summoning of a qualified venire, which mirrors the racial, gender, and ethnic makeup of the community. Each of those venire members comes to the Court with a lifetime of "baggage" of collective experiences, attitudes and opinions, which make that juror more or less impartial than the next juror. By what means can the defendant reasonably "inspect that baggage" to learn whether jurors, because of racial factors, may be impartial?[7]

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[4] John Gage Allee, ed., Webster's Dictionary, U.S.A., p. 186.

[5] Morris, p. 955.

[6] Allee, p. 270.

[7] It is clearly not adequate to protect the right of a defendant against jurors who for any reason may have a bent of mind against him or her, due to the possibility of disqualifying racial attitudes, to circumscribe a defendant's right to

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Petitioners have asserted that at trial the counsel for the respondents " . . . have clearly indicated their intention to use their peremptory strikes in a racially discriminatory manner . . . " Brief of Petitioner, p. 5.

Respondents clearly have no idea at this stage of the proceedings as to how and for what reasons they will exercise their peremptory challenges, only that they will be exercised pursuant to the law but in total regard for the defense of the clients. Respondents have not been to trial, nor been confronted with a jury panel.[8]

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challenge a juror of another race only in situations when the defendant is able to actually establish racial prejudice of the juror. In that situation, the defendant does not need a peremptory challenge since the juror would be excused for cause. However, aside from this, bias is something that no person wishes to acknowledge. General voir dire questions concerning impartiality or even specific questions concerning racial bias, will not serve the purpose; but, at best, if a juror harbors racial bias, only a meaningful and thorough cross-examination will suffice, and even that may not succeed. Sometimes, a person may not be able to recognize his or her own racial bias. In the light of the courts' somewhat limited restricted view of voir dire questions [(Annots., 28 A.L.R.Fed. 26 (1976); 94 A.L.R.3d 15 (1979); 54 A.L.R.2d 1204 (1957)] such an examination of a juror may not even be allowed. Even so, a defendant, recognizing his or her limited chance of success, would be put into a critical quandary of whether to enter into such a vigorous examination, realizing that it would irritate and alienate the juror so that if the voir dire examination was unavailing to show bias, he would be saddled with a truly unfriendly juror. No defendant, in a good faith effort to protect his freedom, should be placed in such a position.

[8] There is no way for the parties in this case to determine or estimate the ethnic, racial or gender makeup of the jury. The

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One obvious reason that a criminal defendant of one race may act to peremptorily challenge a juror of another race is the fear that the juror may harbor some degree of ill will towards the defendant's race, and as a result, might, for that reason, be more inclined to vote for conviction. That fear may be more intense where the victim of the crime and the government's witnesses are of the same race as the juror. It may be even more vivid where a community organization composed of members of the race of the juror and the victim, has widely circulated a pamphlet in which the defendant is adjudged without benefit of trial to have unjustifiably assaulted the victims because of their race and calling upon the race of the victim to retaliate by boycotting the defendant's business. (JA 38).

If a criminally accused defendant is constitutionally entitled to be tried by a jury free of jurors that are or even may be biased against him or her, any rule that prohibits the defendant from considering racial attitudes in using peremptory challenges will, in reasonable likelihood, deprive the defendant, whatever his race, of that critical constitutional right.

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jury panel placed upon respondents (when the case is called for trial) may be vastly different from the racial composite indicated by the census. The jury panel may be composed totally of those excluded or not chosen from other jury panels throughout the trial term. This may drastically alter the makeup of the jury panel as compared to the original venire and greatly affect the decisions as to how and why peremptory challenges are exercised.

The NAACP Legal Defense Fund amicus brief suggesting reversal of the Georgia Supreme Court clearly recognizes this fundamental problem at pages 8 and 9:[9]

2. The Right of a Defendant to an Unbiased Jury.

> A criminal defendant has the right not to be tried by a racially biased jury. *Aldridge v. United States*, 283 U.S. 308 (1931); *Ham v. South Carolina*, 409 U.S. 524 (1973). Often, voir dire and challenges for cause are not enough to protect a defendant, and any minority defendant faced with the possibility of biased jurors must have recourse to peremptory challenges.
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> In theory there is a distinction between a race-based peremptory challenge used to discriminate invidiously in violation of *Batson*, and a peremptory challenge used to prevent discrimination by removing a juror whom the defendant believes harbors racial prejudice. In practice, however, it may often be difficult for the trial court to distinguish between the two cases, just as often the voir dire, if the circumstances of the case do not permit a searching

[9] Thus, amicus recognizes that the ruling sought here by the state could be perilous to the rights of a black defendant, although it proposes that the court adopt the anomalous solution that a black defendant be permitted to strike white jurors because they are white in order to get black jurors on the jury; but that since racial animus is involved in the crime with which the defendants here are charged (an element manufactured by leaders of the black community), the court should prohibit the defendants from challenging black jurors because they are members of the race that the defendants are charged with victimizing; presumably, so they can show their resentment in exercising their functions as jurors.

> inquiry into racial prejudice, may not be able to elicit sufficient proof of bias to permit a challenge for cause. Whatever the injury to a prospective juror of being excluded from a particular jury, the injury to a defendant by being tried by a jury infected with racial prejudice is far greater.

This Court implied in *Powers* that racial factors could be relevant with regard to jury selection when discussing the white defendant's objection to the prosecutor's exclusion of black jurors.

> " . . . The record does not indicate that race was somehow implicated in the crime or the trial; nor does it reveal whether any black persons sat on petitioner's petit jury or if any of the nine jurors excused by peremptory challenge were black persons . . . " at 420.

The peremptory challenge in which the defendant may act without the constraint of the state and without the discretion of the supervising judge is the only means available for the defendant to combat possible bias on his jury and enforce his constitutional rights to a fair and impartial trial. Otherwise, the state will dictate to the defendant which jurors he must accept. Clearly, the peremptory challenge was and is the *mechanism* to give the defendant the tool to eliminate even suspected partial jurors.[10] Although not perfect, it protects the interest of the defendant in his adversarial relationship to the state.

[10] The idea of peremptory challenges is a perfectly valid and reasonable system of attempting to find a fair and impartial jury to determine the guilt or innocence of a defendant

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A holding in this case that the defendants are precluded from exercising peremptory challenges to challenge black jurors because of racial bias against the defendants and their race would amount to a holding that there can never be a situation in which there are racial considerations which could cause there to be general bias by members of one race toward the race of the accused in the criminal trial.

Such a result is repugnant not only to the rights secured by the constitutional rights of a defendant charged with a crime but to the wisdom and foresight of those who recognized that the peremptory challenge was a practical and necessary method to deal with juror bias.

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accused of criminal conduct. It is not an arbitrary system, but is based on the reasonable assumption that jurors will not always voluntarily admit to hostile feelings or even unfriendly feelings towards others which, from the very nature of human beings, would lead them to champion the cause of one side or the other.

The laws, found everywhere, which automatically eliminate jurors on account of kinship to parties involved in a judicial controversy, are clearly based on the assumption that, as a known and understandable trait of human beings, the juror would tend to favor his or her kin. This same natural trait is to be found among the many races which are represented by the citizens of this country, and there is no reason to prohibit a defendant charged with crime from recognizing this human tendency in attempting to protect himself or herself from a biased conviction.

In *Strauder* this Court held that total exclusion of blacks from jury service because of their race "is practically a brand upon them, affixed by the law; an assertion of their inferiority." However, the act of a defendant in challenging a juror of a different race does not assert the inferiority of, or in any real sense, put any kind of brand on the juror – it is simply an expression of apprehension and fear by a defendant charged with a crime that the juror may to some degree harbor hostility or enmity towards the defendant's race; and, therefore, may be less than objective in determining the innocence or guilt of the defendant, and especially is this a factor that such a defendant ought to be allowed to consider when the victim of the crime is a member of the juror's race.

The ruling in *Batson* prohibiting the government from challenging a juror for no other reason than the similarity of the juror's and the defendant's races operates to give the defendant a better opportunity of having jurors of his own race on the jury. That same purpose cannot be carried out but will in fact be thwarted by barring a defendant from challenging members of another race, whom he believes, rightly or wrongly, because of racial considerations, may be more inclined to arrive at a verdict of guilty. The *Batson* rule deprives the government of nothing to which it is entitled. It simply says that the government should not deprive a defendant charged with crime of whatever advantage it may be to the defendant of having members of his race on the jury. Here, the Court is urged to deprive a defendant of whatever advantage it might be to have jurors of his or her own race on the jury. Such a result is not mandated or warranted by the *Batson* ruling.

It is argued that since in *Batson* the Court has prevented the state from using peremptory challenges to eliminate jurors of the defendant's race (or any other race) when the challenge is race based, the Court should likewise not allow a defendant to use peremptories to challenge a juror of another race even though the defendant reasonably fears the racial bias that the juror may have will tend to tilt the juror's thinking against the defendant and in favor of the state or even though, by so using the challenge, the defendant will be able to put a juror of the defendant's own race on the jury: since, it is said thereby the defendant will be given a greater opportunity to shape the jury than will the state. It is bemoaned that such would not be "fair to the state." This argument, being nothing more than "tit for tat" in character, bears no credibility.

If there is one clear conclusion which stands out in an overview of the criminal jurisprudence of this country it is that through constitutional provisions and other laws the state and a defendant do not enter the judicial arena equally armed. The defendant enters with the presumption of innocence which the state must remove, not by the preponderance of the evidence, but beyond a reasonable doubt. The state must furnish to a defendant any evidence favorable to the defendant that it discovers; whereas, a defendant who discovers evidence favorable to the state is under no duty to disclose it to the state and may even take steps to secrete it. A defendant in federal courts and in a number of states is given more peremptory challenges than the state. It seems self-evident that the defendant's increased ability by virtue of *Batson's* disarming the state of use of its peremptory challenges

based upon race, to eliminate from the trial jury members of another race whom the defendant fears may be influenced against him by race-based emotions of racial loyalty, enmity, hostility and the like, will be doing nothing more than assuring the defendant that he or she will *not* be tried (and convicted) by a partial jury contrary to his constitutional rights. That in the process of using peremptory challenges, a defendant may be able to obtain a jury which by race or otherwise is, or might reasonably be concluded to be, favorable to him, is simply a result of his constitutional guaranty of not being tried (and convicted) by a jury that is biased against him or her; and violates no rights of the state nor of the jurors so removed.

While in theory a criminal defendant has no constitutional right to a jury biased in his or her favor, this does not lead to the conclusion that the defendant must use peremptory challenges only with the view of producing a jury which might be reasonably viewed as being impartial to both the defendant and the state. If a defendant can use his or her challenges so as to produce a jury which may be sympathetic to him or her, this violates no right of the state.

The fundamentally difficult decision to make in this case is that we must continue to allow the exercise of the peremptory challenge without restriction by the criminally accused to ensure fair and impartial juries under the Constitution even though the exercise of such peremptory challenges may in certain cases exclude jurors because of racial factors.

Such a decision is analogous to Justice Harlan's defense of our constitutional safeguards in the criminal

adversary proceeding when he stated, "It is better for a guilty man to go free than to convict an innocent man." *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, at 386, 90 S.Ct. 1068 (1970). Is it not better for a juror to be excluded by race than to risk an accused being tried by jurors who might be biased against him?

CONCLUSION

For all of the foregoing reasons, the Georgia Supreme Court should be affirmed, and this Court should hold that the United States Constitution does not prohibit a criminal defendant from the unrestricted exercise of peremptory jury challenges.

Respectfully submitted,

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No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. Respondents contend (Br. 2-12) that the racially discriminatory exercise of peremptory challenges by a criminal defendant cannot be state action because the criminal defendant has an adversary relationship to the State with respect to the determination of guilt or innocence. That contention ignores the uniquely governmental character of jury selection and the distinctive role that the defendant plays in that process when exercising a peremptory challenge.

The jury is not a mere assemblage of private citizens. Its members come to court because their presence is compelled by the State; a juror's service is required, or

excused, only by specific action of the trial judge; and the jury once empaneled sits as a "quintessential governmental body" charged with rendering verdicts in accordance with law. *Edmondson v. Leesville Concrete Company, Inc.*, 500 U.S. ___, 111 S. Ct. 2077, 2085, 114 L.Ed.2d 660, 676 (1991). The selection of the jury is, therefore, unquestionably an exercise of government power. It is the State that bears the ultimate responsibility to impanel an "impartial jury." U.S. Const. amend. VI. The defendant participates in choosing the jury, through the exercise of peremptory challenges, only because the State has clothed the defendant with that delegated right.

No other action by a criminal defendant is comparable to that exercise of governmental power. The peremptory challenge forms an integral part of the State's system for selecting the decisionmaker; the defendant, by participating in that system, becomes a state actor for a limited purpose. While the State may give the defendant the right to exclude jurors through peremptory challenges, the State may not license the defendant to do so in a racially discriminatory manner – any more than the State can allow private civil litigants or the prosecutor to exercise peremptory challenges in a racially discriminatory manner. As this Court explained in *Edmonson*, 500 U.S. at ___, 111 S. Ct. at 2087, 114 L.Ed. 2d at 678, "[i]f peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system." The resulting injury to the equal protection rights of jurors would directly flow from "governmental delegation and participation" in the peremptory challenge process. *Id.*

Respondents suggest (Br. 5) that "[i]f a defense attorney in representing a defendant accused of a crime is a state actor in exercising peremptory challenges, then the attorney must be considered a state actor in every phase of the trial." That contention is unfounded. Unlike the defendant's strategic actions throughout trial designed to secure an acquittal, the defendant's exercise of a peremptory challenge draws on a power granted by the State as part of the State's process for designating the jurors who will decide the case. That activity is functionally unlike anything else that the defendant does during the trial.[1] A holding that the defendant's peremptory challenge is state action for purposes of applying equal protection limitations would not, therefore, suggest that defense counsel's general representation of the defendant constitutes state action. *See Polk County v. Dodson*, 454 U.S. 312 (1981).[2]

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[1] Amicus National Ass'n of Criminal Defense Lawyers analogizes the peremptory challenge to the subpoena power, which permits the defendant to invoke the court's authority to compel the attendance of a witness. Br. 13-14. Whatever decisions a defendant makes about calling witnesses, however, do not influence the composition of a governmental body, as does the exercise of a peremptory challenge. Nor, in light of the Sixth Amendment's explicit protection of the defendant's right to compulsory process, can the defendant's unilateral decision to cause the issuance of a subpoena be fairly attributed to the State.

[2] *Polk County* noted as characteristic defense functions the entry of a plea, moving to suppress evidence, objecting to government evidence conducting cross-examination, and making closing arguments. 454 U.S. at 320. That case did not

(Continued on following page)

Nor would a finding of state action imply that the criminal defendant is not an adversary of the prosecutor when exercising particular peremptory challenges. The State expects the defendant to act in his own interest when exercising peremptory challenges.[3] The finding of state action simply means that when the defendant uses peremptory challenges to eliminate jurors because of their race, the defendant is using power "possessed by virtue of state law" and is inflicting injury on the excluded jurors that is "made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). If the Fourteenth Amendment is to succeed in the purpose of eliminating race as a valid criteria for denying jury service, the defendant's peremptory challenges must be treated as state action.

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consider the role of defense counsel during jury selection, nor did the case examine whether the special factors surrounding the peremptory challenge process justify treating that function as state action for the purposes at issue here. As this Court noted in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974), state action determinations must focus on the particular function at issue, and "differences in circumstances beget differences in law."

[3] Indeed, the State's purpose in allowing such challenges is to enhance the appearance that the verdict is rendered by persons who are fair, and thereby to promote acceptance of the verdict by the defendant and the community. That purpose is not inconsistent with a rule that the defendant cannot use discrimination to undermine the credibility of the trial process by eliminating jurors on the basis of race.

2. Respondents argue (Br. 13-24) that fulfillment of the defendant's right to an "impartial jury" requires that the defendant must have the opportunity to exercise peremptory challenges for racially discriminatory reasons. This Court has already rejected respondents' argument.

A criminal defendant has no constitutional right to exercise peremptory challenges. *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988); *Batson v. Kentucky*, 476 U.S. 79, 91 (1986); *Swain v. Alabama*, 380 U.S. 202, 219 (1965); *Stilson v. United States*, 250 U.S. 583, 586 (1919). The Constitution requires that the venire be assembled from a fair-cross section of the community. The Constitution also requires that jurors be excluded when they indicate they are incapable of rendering a verdict in accordance with the law and the evidence. A State is not required, however, to permit the defendant to remove a juror when there is no "cause" to believe that the juror is biased. Because a jury can be "impartial" without the defendant having had *any* peremptory challenges, the defendant's right to a fair trial is not infringed when the privilege of the peremptory challenge is limited by prohibiting its use to remove a juror because of his race.

Indeed, the relatively modest inroad on the peremptory challenge that is at issue in this case would hardly strip the defendant of the benefits of that device, any more than application of the holding in *Batson* destroyed the utility of the challenge for prosecutors. *Batson v. Kentucky*, 476 U.S. at 98-99 (rejecting contention that the Court's holding will "undermine the contribution the challenge generally makes to the administration of justice"). The concern raised by Amicus National Ass'n of

Criminal Defense Lawyers (Br. 24) that application of *Batson* to the defense would "fatally undermin[e] the defendant's ability to keep from the jury those whom the defendant senses will not be fair" is, therefore, vastly overstated. Moreover, if Respondents fear that the jurors in their case may harbor racial prejudice, the law provides remedies that address that concern. When the potential for racial bias exists, it may be tested through appropriate voir dire. *See Turner v. Murray*, 476 U.S. 28 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1972). If bias is widespread in the community, it may justify a change in venue. *See Irwin v. Dowd*, 366 U.S. 717 (1961). Respondents' fears, however, cannot justify the exercise of peremptory strikes as an outlet for racial prejudice.

Respondents claim (Br. 23) that the defendant must be allowed "to eliminate from the trial jury members of another race whom the defendant fears may be influenced against him by race-based emotion or racial loyalty"; this is true, according to Respondents (Br. 14 n.2), because "among all races there undeniably and understandably exists racial pride, loyalty, and fellowship," which leads, "whenever, a choice must be made, in the very human tendency of a member of one race unwittingly to favor his or her race." Acceptance of Respondents' argument would strike deeply at the value of race-neutrality in jury selection that numerous decisions of this Court have sought to uphold.[4] This Court has firmly

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[4] *See, e.g., Powers v. Ohio*, 499 U.S. ___, 111 S. Ct. 1364, 113 L.Ed.2d 411 (1991) (according standing to criminal defendants to challenge racially based strikes by the prosecutor whether or

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rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror. *Batson v. Kentucky*, 476 U.S. at 97-98, ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption – or his intuitive judgment – that they would be partial to the defendant because of their shared race. * * * The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race."). Respondents' argument is rooted in exactly the type of race-based assumptions that this Court has sought to banish from the courtroom.

The courtroom is a place that both symbolizes and provides the means for enforcing the requirements of the law; the courtroom should not be a place in which official approval is given to the claim that a juror's decisions would be governed by the color of his skin. The injury to equal protection values caused by the race-based exclusion of a juror is not diminished when it is effected at the behest of a criminal defendant. For a trial judge to allow a defendant to deny a person the opportunity to participate

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not the defendant is the same race as the excluded juror); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (condemning discrimination in grand juries); *Hill v. Texas*, 316 U.S. 400 (1942) (condemning discrimination in grand juries); *Ex Parte Virginia*, 100 U.S. 339 (1880) (condemning discrimination against jurors by judges); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (condemning discrimination against jurors by statute).

in the civic duty of jury service because of his race is to have the government tacitly acquiesce in a form of discrimination that the Constitution commands government to eradicate. Here, as in *Powers v. Ohio*, 499 U.S. at ___, 111 S. Ct. at 1370, 113 L.Ed.2d at 424, the judicial system "may not accept as a defense to racial discrimination the very stereotype the law condemns."

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

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STATE OF GEORGIA, PETITIONER

v.

THOMAS MCCOLLUM, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on grounds of race in the exercise of peremptory challenges.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The case presents the question whether the exercise of a peremptory challenge by a criminal defendant is governed by the standards of race neutrality that are applicable to the prosecution's peremptory challenges under *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Pursuant to the Federal Rules of Criminal Procedure, the defendant in a federal criminal case is entitled to exercise 20 peremptory challenges in a capital case; ten in a felony case; and three in a misdemeanor case. Fed. R. Crim. P. 24(b). The issue whether the Constitution places restrictions on a defendant's use of peremptory challenges has arisen in

a number of federal criminal cases. Two courts of appeals now have the issue under en banc review. See *United States* v. *DeGross*, 913 F.2d 1417, 1423-1424 (9th Cir. 1990), reh'g en banc ordered, 930 F.2d 695 (1991); *United States* v. *Greer*, 939 F.2d 1076, 1083-1086 (5th Cir. 1991), reh'g en banc ordered (Dec. 3, 1991). The United States therefore has a significant interest in the resolution of this case.

STATEMENT

1. On August 10, 1990, a grand jury sitting in Dougherty County, Georgia, returned a six-count indictment charging respondents with aggravated assault and simple battery. J.A. 2-5. The indictment alleged that, on January 5, 1990, respondents assaulted and beat Myra Collins. *Ibid.* Respondents are white; the alleged victim is black. J.A. 6. Shortly after the events giving rise to the indictment, a leaflet was widely distributed in the local black community reporting the assault and urging community members not to patronize respondents' business. J.A. 40.[1]

[1] The leaflet, distributed by Rep. John White, Chairman of the Unity Community of Albany, Georgia, stated, in pertinent part (J.A. 40-41):

> "*BE INFORMED* . . . The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning."
>
> "This Community must respond to this violent act with 'non-violence' & direct action. *We urge you to select another Dry Cleaners for your clothing.*"
>
> "The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you."

Under Georgia law, the petit jury in a felony trial is selected from a panel of 42 persons. Ga. Code. Ann. § 15-12-160 (Michie 1990). Both the defendant and the State may challenge jurors for cause. § 15-12-163. In addition, both the defendant and the State have the right to exercise peremptory challenges. When the defendant is indicted for a capital offense or an offense carrying a penalty of four or more years of imprisonment, the defendant "may peremptorily challenge 20 of the jurors impaneled to try him." § 15-12-165. For offenses carrying a lesser penalty, the defendant "may peremptorily challenge 12 of the jurors impaneled to try him." *Ibid.* In all cases, "[t]he state shall be allowed one-half the number of peremptory challenges allowed to the accused." *Ibid.*

Before jury selection began, the State filed a motion to prohibit respondents from exercising their peremptory challenges in a racially discriminatory manner. J.A. 6-8. After noting the race of the defendants and the victim, the State indicated that it expected to show that the victim's race was a factor in the alleged assault. J.A. 6-7. Observing that 43 percent of the Dougherty County population is black, the State also indicated that, if a statistically representative panel is assembled for jury selection, 18 of the 42 potential jurors would be black persons. With 20 peremptory challenges, respondents would therefore be able to remove all of the black potential jurors. J.A. 7. Relying on *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Sixth Amendment, and the Georgia Constitution, the State sought an order requiring that, if a prima facie case of racial discrimination by the defense is made out, respondents would be required to articulate a racially neutral explanation for their peremptory challenges. J.A. 7-8.

The trial judge denied the State's motion. The judge found that "[n]either Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner." J.A. 14. Recognizing that the issue was "one of first impression for the Georgia courts," the court certified the issue for immediate appellate review. J.A. 15, 18.

2. The Supreme Court of Georgia granted the application for interlocutory review and directed the parties to address, in particular, the question whether the Georgia Constitution prohibits race-based peremptory challenges by the defendant in a criminal case. J.A. 16-17. The State's opening brief contended that the state constitution does prohibit such strikes by the defense. J.A. 18-23. After this Court decided *Powers* v. *Ohio*, 111 S. Ct. 1364 (1991), and *Edmonson* v. *Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), the State filed supplementary briefs urging the supreme court to hold that not only Georgia law, but also the Equal Protection Clause of the Fourteenth Amendment prohibits a defendant from exercising racially discriminatory peremptory challenges. J.A. 42-45.

The reviewing court affirmed the trial court's ruling. J.A. 46-57. The court acknowledged that in *Edmonson* v. *Leesville Concrete Co.*, *supra*, this Court had found that racial discrimination in the exercise of a peremptory challenge "constitute[s] an impermissible injury" to the excluded juror. J.A. 46. The court noted, however, that *Edmonson* involved private civil litigants, not criminal defendants. *Ibid.* "Bearing in mind the long history of jury trials as an essential element of the protection of human rights," the court "decline[d] to diminish the

free exercise of peremptory strikes by a criminal defendant." *Ibid.*[2]

SUMMARY OF ARGUMENT

A. Both the defendant and the prosecution have long been granted peremptory challenges in this country. This Court has held, however, that the prosecutor's use of a peremptory challenge to exclude a juror on grounds of race violates the equal protection rights of the excluded juror. The Court has further held that a defendant may raise a claim of such discrimination whether or not the defendant's own equal protection rights are violated.

Because it is the government itself that creates and enforces peremptory challenges, this Court determined that it violates the Constitution for a private civil litigant to exercise a peremptory challenge based on the juror's race. The premise of that holding is that a litigant's exercise of the delegated right to exclude a person from jury service constitutes state action. The exercise of the challenge therefore triggers application of the Constitution's equal protection requirements.

B. A criminal defendant's exercise of a peremptory challenge is also properly viewed as state action that is subject to the constitutional constraint against action based on race. The features of the peremptory challenge system that make it appropriate to characterize a civil litigant's challenge as state action are equally present here. First, in criminal cases, as in

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[2] Three justices dissented, arguing that *Edmonson* and other decisions of this Court establish that racially based peremptory challenges by a criminal defendant violate the Constitution. J.A. 47-49 (Hunt, J.); *id.* at 50-55 (Benham, J.), *id.* at 56-59 (Fletcher, J.).

civil cases, the peremptory challenge has its source in an express provision of state law. Second, a criminal defendant exercising a peremptory challenge invokes the authority of the State in the same fashion as a private civil litigant. A peremptory challenge is part of the framework of jury selection procedures established and administered by the State, and the defendant's peremptory challenge is ultimately enforced by the action of the trial judge in excusing the juror. From the perspective of the excluded juror, the impact of a discriminatory challenge is the same, whether the challenge is made by the State, by a criminal defendant, or by a private civil party.

Prohibiting race-based challenges by the defense neither violates the defendant's constitutional rights nor impairs his ability to secure a fair trial. Indeed, to leave the defense free to discriminate on racial grounds, in a manner that is prohibited for the prosecution, would give rise to a potential for imbalance in the composition of juries. Respondents have no constitutionally recognized interest in excluding minority jurors on grounds of race, and to accept such a claim would undermine public confidence in the integrity of the jury system.

C. The State has standing to assert the equal protection rights of a juror who is excluded on racial grounds at the instance of the defense. That conclusion follows not only from decisions of this Court allowing third-party standing for criminal defendants and civil litigants to object to discriminatory peremptory challenges by their adversaries, but also from the government's responsibility to protect the civil rights of its citizens. In light of that responsibility and the State's interest in securing a jury that is chosen by fair and legitimate procedures, the State is a proper

party to object to racially discriminatory challenges by criminal defendants.

ARGUMENT

THE CONSTITUTION PROHIBITS A CRIMINAL DEFENDANT FROM EXERCISING A PEREMPTORY CHALLENGE BASED ON THE JUROR'S RACE

A. Race-Based Peremptory Challenges Violate Equal Protection Principles

Georgia's provision of peremptory challenges to both the government and the accused in a criminal case accords with the longstanding and universal practice in state and federal courts in this country. See *Swain* v. *Alabama*, 380 U.S. 202, 212-219 (1965); *Holland* v. *Illinois*, 493 U.S. 474, 481 (1990). The practice has deep roots in English common law. See 4 W. Blackstone, *Commentaries* 353-354 (Tucker ed. 1803).[3] As traditionally conceived, the "essential nature" of a peremptory challenge is a power that a litigant may use to exclude a particular juror even when the reasons for exclusion do not rise to a level that would justify removal of the juror for cause. *Swain*, 380 U.S. at 220. Because the peremptory challenge permits the parties to remove jurors whose bias is suspected but cannot be proved, the device is thought to enable the elimination of "extremes of

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[3] English practice, however, has changed. In the past century, the right to exercise peremptory challenges was rarely used in England. *Swain*, 380 U.S. at 213 n.12. Peremptory challenges were ultimately abolished in England by the Criminal Justice Act 1988, ch. 33, pt. VIII, § 111. See Gobert, *The Peremptory Challenge—An Obituary*, [1989] Crim. L. Rev. 528.

partiality on both sides." *Holland*, 493 U.S. at 484, quoting *Swain*, 380 U.S. at 219. Peremptory challenges therefore further "the purpose of the jury system * * * to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." *Powers* v. *Ohio*, 111 S. Ct. 1364, 1372 (1991).

Although historically well established, the peremptory challenge may not be exercised in violation of constitutional provisions such as the Equal Protection Clause of the Fourteenth Amendment. In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court held that a prosecutor's exercise of a peremptory challenge to exclude a potential juror on grounds of race violates the Equal Protection Clause. The Court explained that the purposeful exclusion of a juror because of race not only infringes the right of a defendant of the same race to equal protection of the laws, but also amounts to "unconstitutional[] discriminat[ion] against the excluded juror" and inflicts harm on the community as a whole by "undermin[ing] public confidence in the fairness of our system of justice." 476 U.S. at 86-87. *Batson* overruled the holding of *Swain* v. *Alabama*, *supra*, that a defendant could not challenge the racially discriminatory use of peremptory challenges based solely on the prosecutor's actions in a particular case. *Batson*, 476 U.S. at 82, 91-93, overruling *Swain*, 380 U.S. at 221-222. See also *Ford* v. *Georgia*, 111 S. Ct. 850, 855 (1991); *Griffith* v. *Kentucky*, 479 U.S. 314, 326 (1987); *Allen* v. *Hardy*, 478 U.S. 255, 258-259 (1986) (per curiam).

Recognizing that one of the interests underlying *Batson*'s holding is that of the excluded juror, this Court ruled in *Powers* v. *Ohio*, *supra*, that a defendant may challenge a prosecutor's race-based peremptory strike "whether or not the defendant and the excluded juror share the same race." 111 S. Ct. at 1366. The Court explained that a juror who is peremptorily struck on grounds of race suffers a violation of his own equal protection rights; the defendant in such a case is appropriately accorded third-party standing to vindicate the excluded juror's claim. *Id.* at 1370-1373. *Powers* reaffirmed the principle, embraced by this Court for more than a century, that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and integrity of the courts." *Id.* at 1366, citing, *inter alia*, *Strauder* v. *West Virginia*, 100 U.S. 303 (1880).

Until *Edmonson* v. *Leesville Concrete Co.*, 111 S. Ct. 2077 (1991), all of the cases to reach this Court presenting the problem of racially discriminatory peremptory challenges involved claims of discrimination by prosecutors. Because those claims were directed at the conduct of government officials, responsibility for the discriminatory acts could readily be assigned to the government. In those cases, the "state action" that is required to trigger the Constitution's protections of individual rights was established by the actions of the prosecutor, a quintessential state actor.

In *Edmonson*, by contrast, the contested peremptory challenges were exercised by a private defendant in a civil action; the plaintiff claimed that the defendant's challenges violated the equal protection component of the Due Process Clause of the Fifth Amendment.[4] This Court therefore confronted as a

[4] The Fifth Amendment applied because the case was tried in federal court. See *Edmonson*, 111 S. Ct. at 2080, citing

threshold question whether state action was present at all in that setting. To answer that question, the Court employed the analytical framework summarized in this Court's decision in *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922 (1982).[5] As the Court observed in *Edmonson*, two inquiries are necessary to determine whether the actions of a private party are sufficiently attributable to the government to implicate constitutional protections: first, "whether the claimed constitutional deprivation result[s] from the exercise of a right or privilege having its source in state authority"; and second, "whether the private party charged with the deprivation could be described in all fairness as a state actor." 111 S. Ct. at 2082-2083, citing *Lugar*, 457 U.S. at 939-942. After a detailed analysis of the peremptory challenge system, the Court concluded that a private civil litigant is properly characterized as a state actor when exercising a peremptory challenge. Accordingly, the Court held that it violates the Constitution for such a per-

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Bolling v. *Sharpe*, 347 U.S. 497 (1954). The standard for deciding whether a private person is a state actor is the same under the Fifth and the Fourteenth Amendments. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 542 & n. 21 (1987); see *Edmonson*, 111 S. Ct. at 2082-2083 (citing, interchangeably, Fifth and Fourteenth Amendment state action cases).

[5] The Court in *Lugar* held that a private litigant is appropriately characterized as a state actor when he "joint[ly] participat[es]" with state officials in securing the seizure of property in which the private party claims to have rights. 457 U.S. at 932-933, 941-942; see *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); see also *Connecticut* v. *Doehr*, 111 S. Ct. 2105, 2111-2112 (1991).

son to use a peremptory challenge to exclude a potential juror on grounds of race. 111 S. Ct. at 2081-2087.

B. A Criminal Defendant's Exercise Of A Peremptory Challenge Constitutes State Action

The analysis in this case parallels the analysis employed by the Court in *Edmonson*: a criminal defendant, like a civil litigant, is appropriately characterized as a state actor when he exercises a peremptory challenge. The adversary relationship between the prosecutor and the defendant does not change the fact that, in exercising a peremptory challenge, the defendant is drawing upon a source of government power to affect the selection of the jury, a function that is intrinsically governmental. And the application of the procedures of *Batson* to a criminal defendant does not violate the defendant's rights.

1. *A Peremptory Challenge Exercised by a Criminal Defendant Is an Action That Is Fairly Attributable to the State*

Under *Edmonson*, the first inquiry in analyzing whether a private litigant acts on behalf of the State is whether the right being exercised derives from state law. The peremptory challenges considered in *Edmonson* satisfied that test, because they "are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who would otherwise satisfy the requirements for service on the petit jury." 111 S. Ct. at 2083. As in *Edmonson*, a Georgia defendant's peremptory challenge is made possible by a right having its source in state law. The defendant's right to exercise peremptory challenges

and the scope of that right are established by a specific provision of state law. Ga. Code. Ann. § 15-12-165 (Michie 1990).

The second inquiry is whether "the [private] party charged with the deprivation * * * may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937; *Edmonson*, 111 S. Ct. at 2083. In resolving that issue, *Edmonson* found it useful to apply three principles distilled from prior decsions: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2) "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." 111 S. Ct. at 2083. As to the first principle, the *Edmonson* Court found that the peremptory challenge system, as well as the jury trial system as a whole, "simply could not exist" without direct and substantial government participation, and that private parties necessarily rely on governmental authority in exercising each challenge. *Id.* at 2084.

Describing the federal system, the Court explained that the government composes jury lists, establishes juror qualifications, summons the jurors to court, and pays them a *per diem* allowance for their appearance. Courts then assist in gathering information to determine whether the jurors should be challenged; typically, the court itself conducts the voir dire. Finally, the judge oversees the jury selection process and, "[w]hen a lawyer exercises a peremptory challenge," it is "the judge [who] advises the juror he or she has been excused." 111 S. Ct. at 2084. Based on those factors, and especially on "the direct and indispensable participation of the judge," the Court concluded that the exercise of peremptory challenges involves

the government with the challenged discriminatory conduct in a "significant way." *Id.* at 2085.

Georgia law similarly provides the defendant with the right to exercise peremptory challenges as one component of the State's overall procedure for selecting the jury. Georgia provides for the compilation of jury lists by the board of jury commissioners in each county and establishes the general criteria for service and the sources of citizens to produce a pool of qualified jurors representing a fair cross section of the community. Ga. Code. Ann. § 15-12-40 (Michie 1990). State law further provides that jurors are to be selected by a specified process, § 15-12-42; they are to be summoned to court under the authority of the State, § 15-12-120; and they are to be paid an expense allowance by the State whether or not they serve on a jury, § 15-12-9. At court, potential jurors are placed in panels in order to facilitate examination by counsel, § 15-12-131; they are administered an oath, § 15-12-139; they are questioned on voir dire to determine whether they are impartial, § 15-12-164; and they are subject to challenge for cause, § 15-12-163.

In felony cases, 42 jurors are empaneled, "from which the defense and the prosecution may strike jurors." § 15-12-160. The number of peremptory challenges is specified by statute, with the State being allowed one-half of the number allowed to the defense. § 15-12-165.[6] When a peremptory challenge is exer-

[6] Under Ga. Code. Ann. § 15-12-165 (Michie 1990), 20 challenges are allowed to the defendant when facing charges carrying a penalty of life or more than four years' imprisonment, and 12 are allowed for lesser offenses. These provisions, and the authorization for the State to exercise one-half the number of challenges given to the defendant, have long

cised, it is the trial judge who excuses the juror from service. In light of those procedures, the defendant in a Georgia criminal case relies on "governmental assistance and benefits" that are equivalent to those found in the civil context examined in *Edmonson*, 111 S. Ct. at 2083. "By enforcing a discriminatory peremptory challenge, the Court 'has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination.'" *Edmonson*, 111 S. Ct. at 2085 (citation omitted).

This Court found in *Edmonson* that the selection of a civil jury is a "traditional function of the government," 111 S. Ct. at 2085. The same conclusion applies with even greater force in the criminal context. The selection of a jury in a criminal case ful-

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been part of Georgia law. See Laws 1833, *Cobb's Digest* 835 (1851); *Jones* v. *State*, 1 Ga. 610, 616-617 (1846). Before the 1833 statute, Georgia had followed the English rule, which gave the defendant 20 peremptory challenges in cases of murder and other felonies, while purportedly giving the prosecutor no challenges without cause, but leaving him the right to require jurors to "stand aside" without being "bound to show cause, till all the panel was called over, and not then, unless, from challenges or otherwise, the jury is incomplete." *Sealy* v. *State*, 1 Ga. 213, 216 (1846); W. Blackstone, *Commentaries* 353 (Tucker ed. 1803); see *Holland*, 493 U.S. at 481 n.1. In practice, this procedure was recognized as giving the prosecutor a far greater number of peremptory challenges than the defendant. *Boon* v. *State*, 1 Ga. 618, 619-620 (1846). After the legislature fixed the number of peremptory challenges, the Georgia Supreme Court held that the prosecutor's common law right to have jurors stand aside did not survive, see *Sealy*, 1 Ga. at 217, and that granting peremptory challenges to the prosecutor did not impair the defendant's common law or state constitutional rights. *Jones*, 1 Ga. at 616-617.

fills a unique, and constitutionally compelled, governmental function. The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[7] U.S. Const. Amend. VI. In determining the guilt or innocence of a defendant in a criminal case, the jury is unquestionably performing an official act of the government.[8] The defendant's participation in the selection of that body "represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race." *Edmonson*, 111 S. Ct. at 2086; see *Terry* v. *Adams*, 345 U.S. 461 (1953) (finding state action in the activities of

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[7] The Sixth Amendment echoes Article III of the Constitution, which provides: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, Cl. 3. Similarly, the Georgia Constitution guarantees that "In criminal cases, the defendant shall have a public and speedy trial by an impartial jury." Ga. Const. Art. I, § 1, para. XI.

[8] "[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan*, 391 U.S. at 156.

a private organization that conducted whites-only primaries, because the organization formed an integral part of the State's mechanism for selecting its officials).

Finally, *Edmonson* indicated that the courtroom setting in which the peremptory challenge is exercised intensifies the harmful effects of the private litigant's discriminatory act and contributes to its characterization as state action. 111 S. Ct. at 2083, 2087; cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948) (judicial enforcement of discrimination implicates the "clear and unmistakable imprimatur of the State"). The injury to equal protection values caused by the race-based exclusion of a juror is not diminished simply because the exclusion is at the behest of a criminal defendant.

At the conclusion of the jury selection process, the judge typically announces in open court that particular jurors have been excused and will not participate in the trial. If the judge advises each of the black prospective jurors that they "will not be needed" for jury service, it is not likely to matter much that the defense, rather than the prosecutor or the court, precipitated their removal. The perception —and the reality—will be that the court has excused all the black jurors from participating in the trial because of their race, an outcome that will be attributed to the State and will discredit the State's mechanism for resolving criminal cases. As in *Edmonson*, "[i]f peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system." 111 S. Ct. at 2087. When that occurs, the harm to the excluded juror, and to the legal system, is the product

of "governmental delegation and participation" in the peremptory challenge process. *Ibid.*[9]

2. *The Adversarial Relationship Between the Defendant and the Prosecution Does Not Affect the Governmental Character of the Peremptory Challenge*

That a criminal defendant is the adversary of the prosecution with respect to the charges against him does not change the state action analysis in this case. The particular function at issue here is the selection of the jury through peremptory challenges. In that specific role, the defendant uses a government-delegated right to choose the decisionmaker and thereby becomes a state actor for the purpose of applying constitutional prohibitions against racial discrimination.

The exercise of a peremptory challenge differs significantly from other actions taken in support of the defendant's defense. In a criminal trial, the defendant and his counsel make any number of tactical decisions, such as determining what defenses to raise, what questions to ask on cross-examination, what objections to make to the prosecutor's evidence, whether the defendant should testify, and what witnesses to call, if any. Those decisions by the defense are fundamentally private ones. Indeed, the defendant's

[9] This Court stated in *Swain* v. *Alabama*, 380 U.S. 202, 227 (1965), that "[t]he ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials." *Swain's* approach to peremptory challenges was overruled in *Batson*, and its reasoning on this issue is not authoritative in light of *Edmonson*. Indeed, in *Batson* itself the Court remarked that it was expressing no view on whether the Constitution applies to defense peremptory strikes, thus treating the issue as an open one. *Batson*, 476 U.S. at 89 n.12.

right to make those decisions is constitutionally protected against arbitrary interference by the State. The peremptory challenge, however, is different: it is the State that gives the defendant the right to participate in the selection of the body that will evaluate both parties' evidence. The governmental nature of that function distinguishes the peremptory challenge from other functions of defense counsel that go to the defendant's effort to persuade the finder of fact to acquit him.

For that reason, a finding of state action in this case is consistent with *Polk County* v. *Dodson*, 454 U.S. 312 (1981). There, a defendant brought an action under 42 U.S.C. 1983 against the public defender who represented him on appeal from his conviction; the defendant claimed that the public defender had violated his constitutional rights in failing to provide adequate representation. This Court determined that a public defender does not qualify as a state actor when engaged in his general representation of a criminal defendant, a function that is "in no way dependent on state authority." 454 U.S. at 318.

The defendant's exercise of a peremptory challenge, however, is a function that is critically "dependent on state authority." The power to call—and excuse—jurors is exclusively a function of government. The right to exercise a peremptory challenge flows from the act of the legislature; its mechanism of enforcement is an action of the judge; and its effect is "to determine representation on a governmental body." *Edmonson*, 111 S. Ct. at 2086.

The determination of whether a private person is a state actor for a particular purpose depends on the nature and context of the function being performed.

For example, in *Branti* v. *Finkel*, 445 U.S. 507 (1980), this Court held that a public defender, in making personnel decisions on behalf of the State, is a state actor who must comply with constitutional requirements. And *Dodson* itself noted, without deciding, that "[i]t may be * * * that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions." 454 U.S. at 325. In this case, it is the particular role that the peremptory challenge plays in determining the composition of a governmental body that leads to the conclusion that the defendant's exercise of a peremptory challenge should be treated as state action.

That the defendant exercises a peremptory challenge to further his interest in an acquittal does not conflict with a finding of state action. Whenever a private actor's conduct is deemed "fairly attributable" to the government, it is likely that private motives will have animated the actor's decision. Indeed, in *Edmonson*, the Court recognized that the private party's peremptory challenges constituted state action, even though "the motive of a peremptory challenge may be to protect a private interest." 111 S. Ct. at 2086. Applying that principle here, the defendant's peremptory challenges are appropriately characterized as state action.

3. *Application of Constitutional Constraints to the Defendant's Peremptory Challenges Does Not Infringe the Defendant's Rights*

The Constitution does not require peremptory challenges; they are solely "a creature of statute." *Ross* v. *Oklahoma*, 487 U.S. 81, 89 (1988); *Edmonson*, 111 S. Ct. at 2083; *Holland*, 493 U.S. at 481-482; *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 219; *Stilson* v.

United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured."). Accordingly, the conclusion that equal protection principles are violated by the defendant's invidious use of peremptory challenges does not require a balancing of competing rights; the excluded juror's constitutional right to be free from racial discrimination is paramount to the defendant's statutory right to exercise a particular challenge.

Nor would application of the *Batson* procedures to defense peremptories threaten the Sixth Amendment right to the effective assistance of counsel.[10] One commentator has argued that compliance with *Batson* would require defense counsel to explain the reasons for a particular challenge, which might occasionally require the disclosure of communications protected by the attorney-client privilege; counsel would then be forced either to give up the challenge or to reveal client communications and possibly trial strategy. Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808, 831-833 (1989). Those concerns provide no justification for refusing to protect the juror's constitutional rights.

[10] Under *Batson*, if the defendant establishes a prima facie case of discrimination in the use of peremptory strikes, the burden shifts to the prosecutor to articulate a race-neutral explanation for the particular strikes in question. The trial court must then determine whether the defendant has demonstrated purposeful discrimination on grounds of race. *Batson*, 476 U.S. at 96-98; *Hernandez* v. *New York*, 111 S. Ct. 1859, 1865-1866 (1991) (plurality opinion) (describing the "three-step" inquiry under *Batson*).

Most peremptory challenges are based on general impressions gleaned during the parties' opportunity to observe and examine the jurors in court. Counsel can ordinarily explain the reasons for their peremptory challenges without revealing anything about their trial strategy or any confidential client communications.

In the rare case in which the explanation for a challenge entails confidential communications or would reveal trial strategy, in camera procedures can be devised to protect against unnecessary disclosure. See *United States* v. *Zolin*, 491 U.S. 554 (1989); cf. *Batson*, 476 U.S. at 97 (expressing confidence that trial courts can develop procedures to implement the Court's holding). Sixth Amendment values, even if implicated, would not be infringed by those procedures. See Swift, *Defendants, Racism and the Peremptory Challenge: A Reply to Professor Goldwasser*, 22 Colum. Hum. Rts. L. Rev. 177, 207-208 (1991). In any event, neither the Sixth Amendment nor the attorney-client privilege gives a criminal defendant the right to carry out through counsel an unlawful course of conduct. See *Nix* v. *Whiteside*, 475 U.S. 157 (1986) (defense counsel does not render ineffective assistance when he informs his client that he would disclose the client's perjury to the court and move to withdraw from representation); *Zolin*, 491 U.S. at 562-563; *McCoy* v. *Court of Appeals of Wisconsin*, 486 U.S. 429, 443 (1988).[11]

[11] Any incidental revelation of trial strategy caused by a *Batson*-type inquiry is, of course, equally applicable to the prosecution, so applying *Batson* to defendants would not impose any special burden on the defense. Cf. *United States* v. *Tindle*, 860 F.2d 125, 131-132 (4th Cir. 1988) (approving in camera *Batson* submissions by the prosecutor because of spe-

Far from compromising the defendant's rights, the extension of *Batson* to the defense prevents the defendant from skewing the jury unduly in his favor. "Although the [Sixth Amendment] guarantee [of an impartial jury] runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants: neither the defendant nor the State should be favored." *Holland*, 493 U.S. at 483. The peremptory challenge, while offering some protection for the accused, is also a means for assuring jury impartiality for the government. In *Hayes* v. *Missouri*, 120 U.S. 68 (1887), this Court recognized that purpose in upholding, against an equal protection challenge, a statute that gave the State more peremptory challenges in capital cases tried in larger cities than in other locations. Approving Missouri's goal to secure an impartial jury, the Court stated that "such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Id.* at 70.

If a criminal defendant were permitted to engage in race-based strikes, it would provide an opportunity for significantly distorting the composition of the jury. In this case, for example, if a representative jury panel is called, respondents' 20 peremptory challenges would enable them to exclude all black potential jurors from the jury. J.A. 7. In jurisdictions that have permitted race-based strikes by the defense, peremptory challenges have been used by defendants to achieve all-white juries. See Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 195-196 (1989) (describing two trials in Miami, Florida, in which all black jurors were peremptorily challenged by white police officers accused of a racial beating). That use of the challenge undermines the traditional character of the jury as a body that represents all citizens, and is a mirror image of the problem that led to this Court's decision in *Batson* itself. See *Batson*, 476 U.S. at 101 (White, J., concurring) (noting "widespread" and persistent practice by prosecutors "of peremptorily eliminating blacks from petit juries in cases with black defendants"). Although an individual jury cannot and need not reflect the racial mix of the community, "[d]iscrimination by defense attorneys can undermine the democratic values of the jury system and subvert public confidence in the administration of justice as powerfully as racial discrimination by prosecutors." Alschuler, *supra*, 56 U. Chi. L. Rev. at 196.

This case illustrates that point. Respondents argued in the court below that, because a notice was circulated in the black community calling for a boycott of respondent's business in response to the altercation in this case, it is "essential for the defendants to have the right to utilize peremptory strikes to exclude blacks from the trial jury." J.A. 35.[12] Indeed,

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cial need to protect sensitive information), cert. denied, 490 U.S. 1114 (1989). Moreover, private parties enjoy the protection of the attorney-client privilege against the disclosure of confidential attorney-client comunications, yet this Court in *Edmonson* held that that interest does not prevail over the rights of jurors not to be disqualified on racial grounds. The same analysis applies to the asserted interest in protection of attorney-client communications in the criminal context.

[12] That contention is clearly without merit. The single, non-inflamatory notice distributed in the black community months

respondents went so far as to imply that, because the charges involve an assault on a black victim, a white defendant should automatically be entitled to exclude all black persons peremptorily.[13] The claim that all blacks are incapable of serving as impartial jurors in respondents' trial is antithetical to basic assumptions underlying our jury system. The law provides the means to test bias in cases where race is an issue. See *Ham* v. *South Carolina*, 409 U.S. 524 (1973); *Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981). There can be no rule of presumptive prejudice that applies to all jurors of a particular race. "In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of a religion." *Ristaino* v. *Ross*, 424 U.S. 589, 596 n.8 (1976). For the defense as well as the prosecution, our law reflects the principle that "[a] person's race simply is unrelated to his fitness as a juror." *Batson*, 476 at 87, quoting *Thiel* v.

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before the trial (J.A. 38) could not possibly rise to the level of prejudicing all black jurors in the entire community. Cf. *Mu'Min* v. *Virginia*, 111 S. Ct. 1899 (1991) (pretrial publicity regarding the crimes with which the defendant was charged, though pervasive and intense and reaching most of the jurors, did not rise to the level requiring inquiry on voir dire about the individual jurors' knowledge of the contents of the publicity).

[13] Respondents argued: "Should a person of Iraqi descent charged with committing an assault on a Jewish person be able to excuse by peremptory challenge Jewish jurors on the belief that such jurors could conceivably be inclined to be more partial to a Jewish prosecutor. To ask the question is to answer it. * * * The provisions of *Batson* v. *Kentucky*, *supra* are absolutely unworkable if applied to a criminal defendant." J.A. 35-36.

Southern Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting). As this Court stated in *Powers*, "[w]e may not accept as a defense to racial discrimination the very stereotype the law condemns." 111 S. Ct. at 1370.[14]

C. The Prosecutor Has Standing To Object To The Discriminatory Exercise Of Defense Peremptory Challenges

In *Powers*, this Court concluded that a criminal defendant has standing to raise the equal protection rights of a black juror who was peremptorily challenged by the prosecutor on grounds of race. 111 S. Ct. at 1370-1373. In *Edmonson*, the Court held that the opposing litigant in a civil case has standing to assert the rights of an excluded juror who may have been victimized by a race-based challenge. 111 S. Ct. at 2087-2088. The holdings of those cases are equally applicable to the State's claim that it has standing to object to discriminatory peremptory challenges by a criminal defendant.

No extended analysis of the prosecutor's standing is required in this case, because, as the representative of all its citizens, the State is a logical and proper

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[14] The majority of state courts that have considered the question have concluded that discriminatory defense peremptories are unlawful, either under state or federal constitutional provisions. See, *e.g.*, *People* v. *Kern*, 75 N.Y.2d 638, 554 N.E. 2d 1235, 555 N.Y.S.2d 647, cert. denied, 111 S.Ct. 77 (1990); *State* v. *Levinson*, 71 Haw. 492, 795 P.2d 845 (1990); *State* v. *Anaya*, 96 Ariz. Adv. Rep. 133 (Ct. App. 1991). In the federal system, even if a rule against racially discriminatory defense peremptory challenges were not constitutionally compelled, supervisory powers would justify the imposition such a bar in light of the strong federal policy against racial discrimination in jury selection. See 18 U.S.C. 243; *Peters* v. *Kiff*, 407 U.S. 493 (1972).

party to assert the invasion of the constitutional rights of the excluded jurors in a criminal trial. The Fourteenth Amendment imposes on the State the obligation to provide to persons within the State's jurisdiction the equal protection of the laws. Moreover, the prosecutor "has a legitimate interest in seeing that cases in which he believes a conviction is warranted are tried before the tribunal which the Constitution regards as the most likely to produce a fair result." See *Singer* v. *United States*, 380 U.S. 24, 36 (1965) (upholding constitutionality of a rule requiring prosecutor's consent to the defendant's waiver of a jury trial). Accordingly, the State has standing to object to race-based peremptory challenges exercised by criminal defendants.

CONCLUSION

The judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF GEORGIA,

Petitioner,

vs.

THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM,

Respondents.

On Writ of Certiorari to the Georgia Supreme Court

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Are criminal defendants to be the only litigants granted immunity from the prohibition against racially discriminatory peremptory challenges enunciated in *Batson* v. *Kentucky*, 476 U. S. 79 (1986)?

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation. CJLF seeks to further the interests of victims of crime in the criminal justice system. Specifically, CJLF seeks a recognition that victims as well as defendants are entitled to fundamental fairness and equal protection of the law.

The present case involves the issue as to whether criminal defendants are the only litigants immune from the prohibition

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1. CJLF has received written consent of the parties to file this brief.

against racially discriminatory peremptory challenges announced in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). CJLF contends defendants are subject to *Batson*.

Giving criminal defendants the freedom to racially discriminate against jurors would undermine the integrity of verdicts and respect for the justice system. Because this may have a substantial adverse impact on the victims whose interests CJLF was formed to represent, CJLF has a substantial interest in the case.

SUMMARY OF FACTS AND CASE

Defendants, who are white, were indicted for various assault-based crimes against the victims, who are black. The prosecution filed a pretrial motion to prohibit defendants from exercising racially discriminatory peremptory challenges. Pet. Cert. 2-3. The trial court denied the motion, and the Georgia Supreme Court affirmed, holding that *Batson* did not apply to defense. *Id*., at 3; see *State* v. *McCollum*, 405 S. E. 2d 688, 689 (Ga. 1991).

SUMMARY OF ARGUMENT

Making defense peremptory challenges subject to *Batson* v. *Kentucky*, 476 U. S. 79 (1986) is the logical continuation of this Court's jury discrimination jurisprudence. This Court has consistently opposed jury discrimination in any form. Prohibiting jury discrimination by the criminal defense will close the last unregulated bastion of jury discrimination.

Making defendants immune from *Batson* would be unfair to the prosecution. Subjecting the prosecution but not defendant to *Batson* would give the accused an unwarranted and ultimately unfair advantage in shaping the jury. A proper jury trial is not biased against *either* side. As justice is also due to the accuser, defendants should be as constrained by *Batson* as the People.

Defense jury discrimination harms two substantial constitutional interests. The excluded juror has an equal protection right not to be excluded from the jury for reasons of race. Discriminatory defense peremptories deprive the excluded juror of this important civil right.

The public is also harmed by defendants' discrimination. Jury discrimination, regardless of which side causes it, destroys the public's faith in the jury, creates disrespect for verdicts, and thus undermines the legal system. Such a loss of faith can have disastrous consequences.

Peremptory challenges involve a critical transfer of power from the government to the litigants; without the transfer, a criminal defendant cannot exclude a juror for reasons of race. Defendants' dependence upon the state for this power thus transforms his exercise of the peremptory challenge into state action for the purpose of the Fourteenth Amendment. As the excluded jurors are unlikely to raise their right not to be excluded, and, as the prosecution has a strong interest in preventing jury discrimination, the prosecution has third party standing to raise the juror's claim.

Criminal defendants are not entitled to a special exemption from the *Batson* rule. There is no right to a peremptory challenge under the Sixth Amendment. Immunizing the defense from *Batson* would be a perversion of due process principles. Finally, subjecting defense peremptories to *Batson* will not eliminate them.

ARGUMENT

I. *Batson* applies to criminal defendants.

With *Strauder* v. *West Virginia*, 100 U. S. 303 (1880) this Court started a struggle against one of the bulwarks of racial oppression—jury discrimination. The struggle continues unabated today. See *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 419, 111 S. Ct. 1364, 1366 (1991). Because the jury is such an important part of our civic structure, racial discrimination is

particularly destructive when it infects the jury. Therefore, this Court's vigilance against jury discrimination is particularly important in making good the Fourteenth Amendment's promise of full civil and political rights for all, regardless of race. See *Strauder*, *supra*, 100 U. S., at 306-307.

The jury is one of the oldest and greatest entitlements of Anglo-American law. See *Duncan* v. *Louisiana*, 391 U. S. 145, 151 (1968); 4 W. Blackstone, *Commentaries on the Laws of England* 407 (1st ed. 1769). It is both a check on the state's power, see 4 Blackstone, *supra*, at 343-344, and a badge of citizenship, see *Powers*, *supra*, 113 L. Ed. 2d, at 424, 111 S. Ct., at 1369. Excluding a person from a jury for racial reasons is an "assertion of . . . their inferiority" against the excluded juror. *Strauder*, *supra*, 100 U. S., at 308.

Since *Strauder*, this Court has displayed unequivocal hostility to racial exclusion from jury service. It has forbidden legislative and judicial discrimination, see *id*., at 305; *Ex parte Virginia*, 100 U. S. 339, 346-347 (1880); discrimination in the selection of both grand and petit juries, *Hill* v. *Texas*, 316 U. S. 400, 404 (1942); *Avery* v. *Georgia*, 345 U. S. 559, 561 (1953); discrimination in civil and criminal juries, see *Strauder*, *supra*; *Thiel* v. *Southern Pacific*, 328 U. S. 217, 220 (1946); and discriminatory peremptory challenges, *Batson* v. *Kentucky*, 476 U. S. 79, 96 (1986).

This case presents the last bastion of jury discrimination. This Court has not directly addressed defendants' use of discriminatory peremptories. See *id*., at 89, n. 12. This case can drive the last nail into jury discrimination's coffin.

A. Fairness

Since this Court addressed the issue of discriminatory peremptory challenges in *Batson*, it has examined almost every significant factual setting in this field. It has forbidden discriminatory peremptory challenges by the prosecution, whether the defendant and the juror are of the same race, *Batson*, *supra*, or of different races, *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 419, 111 S. Ct. 1364, 1366 (1991). It has forbidden discriminatory challenges by civil litigants. *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 680, 111 S. Ct. 2077, 2089 (1991). Only criminal defense peremptories have not been analyzed. See *Batson*, *supra*, 476 U. S., at 89, n. 12. The Georgia Supreme Court held that criminal defendants were not subject to *Batson*. Pet. Cert. App. 3. Fairness dictates otherwise. If every other litigant in every other factual setting is subject to *Batson*, there is no reason to immunize criminal defendants.

The greatest harm that may befall our jury system is bias, whether actual or apparent. It destroys the public's faith in the justice of verdicts, ruining the credibility of the system. See *Batson*, *supra*, 476 U. S., at 87. Given the great resources of the state and the inclination of most people to favor the prosecution, this Court justly focuses its energy on preventing the prosecution from improperly influencing the jury in its favor. See, *e.g.*, *id*., at 89, n. 12; *Swain* v. *Alabama*, 380 U. S. 202 (1965). Yet for the jury to be *unbiased* it can favor neither the prosecution nor the defense.

> "But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties. It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. *Between him and the state the scales are to be evenly held*." *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887) (emphasis added).

The peremptory challenge is intended to remove bias against either side, thus insuring an impartial jury. See *Holland* v. *Illinois*, 107 L. Ed. 2d 905, 916, 110 S. Ct. 803, 807 (1990). Granting defendants' request to be free from *Batson* would create an imbalance between the prosecution and defendants in their ability to influence jury selection. This is contrary to the reasoning behind the peremptory challenge. Allowing defendants to have an advantage in shaping the jury runs contrary to the design of most jurisdictions to grant the prosecution and defense equal power over the jury's composition. See 2 W. LaFave, *Criminal Procedure* § 21.3, at 736

(1984).

"A person's race simply 'is unrelated to his fitness as a juror.' " *Batson*, *supra*, 476 U. S., at 87 (quoting *Thiel*, *supra*, 328 U. S., at 227 (Frankfurter, J., dissenting)). Just as the prosecution's use of race-based peremptories destroys defendants' interest in a fair trial, *Batson*, *supra*, at 86-87, a defendant's use of the same tactic is unfair to the prosecution. *Batson* was part of this "Court's unceasing efforts to eradicate racial discrimination" from the jury. *Id.*, at 85. It is not a license for defendants to bias the jury in their favor. "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934). Exempting criminal defendants from the *Batson* rule would be contrary to the purpose of the peremptory challenge.

B. Rights Other Than Defendants'.

1. The juror's right.

The people of Georgia are not the only ones unfairly treated by the state court's decision. The wrongly excluded juror is a victim whose rights are recognized by both the Equal Protection Clause, see *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 424, 111 S. Ct. 1364, 1370 (1991), and an act of Congress, see 18 U. S. C. § 243. The sting of racism, whether from the prosecution or the defense, is the same to the excluded juror. The fairness due to the prosecution, see *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887), is just as due to the juror. Allowing one particular set of litigants to exclude jurors for racially motivated reasons contradicts the spirit of this Court's entire line of jury discrimination decisions.

Although the prohibition against jury discrimination started as a means to protect the criminal defendant's equal protection interest in a fair trial, see *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (1880), this Court has always recognized the excluded juror as a party directly harmed by the discrimination. *Strauder* itself noted that singling out one race as being presumptively unfit for jury service was a brand of inferiority upon them and a stimulant to racial prejudice. *Id.*, at 308. Singling a juror out due to race is no less harmful when done by defendant. Just as if the prosecution did the deed, defendant says to the challenged juror "because of your race you cannot be trusted, you are unfit to make one of the most important decisions in civil society." It is contrary to the postulates behind the Equal Protection Clause to assume that there is no stigma attached to being excluded from a jury due to skin color. See *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 424, 111 S. Ct. 1364, 1370 (1991).

Powers demonstrated the strength of the juror's equal protection right in the area of peremptory challenges.[2] In *Batson*, there was no need to test the strength of the juror's right, because defendant and the excluded juror were of the same race. As the defendant was not of the same race as the excluded juror in *Powers*, the juror's claim had to stand alone. This Court confirmed the juror's right to be free from jury discrimination. It recognized the importance of jury service to the juror:

> " 'The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with direction of society.
>
> * * *
>
> " ' . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism

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2. In a case decided before *Batson*, the juror's right to protection from other forms of jury discrimination was recognized in *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320, 338 (1976).

which is the rust of society.

* * *

> " 'I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.' " 113 L. Ed. 2d, at 422, 111 S. Ct., at 1368 (quoting 1 A. De Tocqueville, *Democracy in America* 334-337 (Shocken 1st ed. 1961)).

As the discriminatory peremptory challenge deprived the excluded juror of "a significant opportunity to participate in civic life," jurors have a right not to be excluded from the jury for racial reasons. 113 L. Ed. 2d, at 424, 111 S. Ct., at 1370.

This Court's most recent application of *Batson* reaffirmed the strength of the juror's right not to be excluded. In *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991), this right formed the foundation for extending *Batson* to the civil trial. The illegality of discriminatory civil peremptories was not based upon any right of the litigants. Instead, the *Edmonson* Court again relied upon the juror's right not to be excluded and allowed the opposing litigant to raise this right against a discriminatory peremptory challenge. 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087. As in *Powers*, the interests of the litigants were subordinate, what mattered most were the victims of the discrimination: the excluded jurors.

Powers and *Edmonson* demonstrate the importance of the juror's right to not be discriminated against. While in many instances the criminal defendant will be harmed by jury discrimination, see *e.g.*, *Strauder*, *supra*, 100 U. S., at 309, any analysis of jury discrimination must also focus upon the excluded juror.

In recognizing this principle, the *Powers* and *Edmonson* Courts equate good law with good sense. The excluded juror receives the most direct taint of bias in a jury discrimination

case. He is accused of being racially tainted. Only the juror is deprived of a civic privilege because of *his* race. Excluding jurors due to race:

> "is practically a brand upon them, affixed by the law; an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder*, *supra*, 100 U. S., at 308.

Focusing on the juror places the law of jury discrimination within the mainstream of equal protection law. Equal protection's "primary concern [is] the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States" due to race. *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948). The notion that the Fourteenth Amendment was designed to secure full civil and political rights for the racially oppressed goes back to the beginnings of the Amendment, see *Strauder*, *supra*, 100 U. S., at 306-307, and is as important today, see *Rose* v. *Mitchell*, 443 U. S. 545, 554-555 (1979).

This is not meant to ignore the harm jury discrimination does to the litigant. Jury discrimination denies equal protection to the litigant by denying him the protection against arbitrary justice guaranteed by a jury of one's peers. Cf. *Batson*, *supra*, 476 U. S., at 86. The juror's rights, however, must still be protected under equal protection and thus remain key to the *Batson* line of cases, as demonstrated by *Powers* and *Edmonson*.

Congress has also recognized the importance of the juror's rights. Federal jury discrimination law does not look to the aggrieved litigant, but instead seeks to protect the excluded juror.

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, col-

> or, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause shall be fined not more than $5,000." 18 U. S. C. § 243.

The statute does not speak in terms of the litigant's rights. It prevents the "citizen" from being disqualified for racial reasons. This underscores the juror's right not to be excluded. See *Peters* v. *Kiff*, 407 U. S. 493, 507 (1972) (White, J., concurring). Thus, both the will of Congress and decisions of this Court demonstrate that when deciding whether to remove the criminal defendant from *Batson*, this Court should look to the excluded juror before addressing defendants' claims.

2. Public interest.

It is not only proper to apply *Batson* to defense peremptories, it is also necessary to do so. Important constitutional interests are at stake, and immunizing defendant from *Batson* would sacrifice these interests for no sufficient reason.

For most people, the most direct sustained exposure they have to the judicial system is through jury service. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 423, 111 S. Ct. 1364, 1369 (1991). While serving as a member of a jury, a citizen will be able to observe firsthand how a trial works, make key, usually unreviewable factual determinations, and apply the law to the facts that decide the fate of the litigants. "Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life." 113 L. Ed. 2d, at 419, 111 S. Ct., at 1366.

The jury thus has its place as one of our most important civic institutions. Its roots are ancient, running back to the earliest Saxon colonies in Britain. See 3 W. Blackstone, *Commentaries on the Laws of England* 349 (1st ed. 1768). The accused was not the only one protected by the jury, however.

Society had a strong stake in having facts determined by an impartial jury drawn from the citizenry. If judges were allowed to determine the facts, our ancestors felt that they would "have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should always be attentive to the interests and good of *the many*." *Id.*, *supra*, at 379 (emphasis in original). A jury drawn from the public would protect society from the powerful. The jury "preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachment of powerful and wealthy citizens." *Id.*, at 380.

This Court continues the common law's respect for the unbiased jury. Of course, the jury exists as a bulwark to protect criminal defendants from arbitrary prosecution and capricious judges. See *Duncan* v. *Louisiana*, 391 U. S. 145, 146 (1968). But the community has an added interest in the jury. It is a democratic institution that all citizens should be allowed to participate in, regardless of group affiliation. It "preserves the democratic element of the law, as it guards the rights of the parties and insures continued acceptance of the laws by all of the people." *Powers*, *supra*, 113 L. Ed. 2d, at 423, 111 S. Ct., at 1369.

> "This [democratic] element is vital to the effective administration of criminal justice not only in safeguarding the rights of the accused, but in encouraging popular acceptance of the laws and the necessary general acquiescence in their application. It can hardly be denied that trial by jury removes a great burden from the shoulders of the judiciary. Martyrdom does not come easily to a man who has been found guilty as charged by twelve of his neighbors and fellow citizens." *Green* v. *United States*, 356 U. S. 165, 215-216 (1958) (Black, J., dissenting).

Discriminatory exclusion "contravenes the very idea of a jury—'a body truly representative of the community,' . . . . " *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320, 330 (1970) (quoting *Strauder* v. *West Virginia*, 100 U. S. 303,

308 (1880)). The harm caused by jury discrimination "is not limited to the defendant, there is injury to the jury system, to the law as an institution, to the community at large—and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U. S. 187, 195 (1946). The harm to the system occurs because jury discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose* v. *Mitchell*, 443 U. S. 545, 555-556 (1979). It thus "impairs the confidence of the public in the administration of justice." *Id.*, at 556. This harm was recognized by the *Batson* Court and integrated into its holding. See *Batson* v. *Kentucky*, 476 U. S. 79, 87 (1986).

These condemnations of jury discrimination were made in the context of discrimination by the state. Although challenges made by the prosecution have dominated the attention of the courts and commentators, see, *e.g.*, *Batson v. Kentucky*, 476 U. S. 79, 89, n. 12 (1986); *Swain v. Alabama*, 380 U. S. 202 (1965); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 Colum. L. Rev. 1357 (1985), given the proper circumstances, the defense can also be motivated to make racially motivated peremptory challenges. See, Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 Colum. L. Rev. 355, 364-365 (1988); P. Di Perna, *Juries on Trial: Face of American Justice* 152 (1984).

This problem was recognized by Justice Marshall in his concurrence in *Batson*. "The potential for racial prejudice, further, inheres in the defendant's challenge as well." *Batson*, 476 U. S., at 108 (Marshall, J., concurring). If defendant is accused of committing a racially motivated crime, counsel might consider it important to peremptorily challenge every venire member who is of the same race as the victim. One example is the racially charged "Howard Beach" case. In this case, four white teen-agers were charged with the killing of a black man in the Queens, New York, neighborhood of Howard Beach. The trial court, in response to the prosecutor's contention that the defense had used peremptory challenges to exclude three prospective jurors because they were black, required the defense to justify further challenges, citing *Batson*. The intermediate appellate court affirmed. *People* v. *Kern*, 545 N. Y. S. 2d 4, 34 (1989). The Court of Appeals affirmed based on the state constitution. *People* v. *Kern*, 554 N. E. 2d 1235, 1236 (N.Y. 1990).

A chilling example of the defense use of peremptory challenges is the case of Arthur McDuffie. McDuffie was a 33-year-old black insurance salesman, with no prior criminal record, who died from head injuries received from the police while being arrested for running a red light. P. Di Perna, *Juries on Trial: Face of American Justice* 179 (1984). The defense used its peremptory challenges to guarantee an all white jury. After hearing six weeks of testimony, the jury took only two and a half hours to return a not guilty verdict. *Ibid.* In the ensuing riot:

> "Blacks ran through the streets chanting 'McDuffie! McDuffie!' and 'Where is justice for the black man in America?' Cars were overturned at the state building. More whites were beaten. The verdict had hit the tense community like gasoline on a flame, because it was perceived as an all-white cover-up. In the end, the riots left sixteen dead, several hundred injured, and approximately $100 million in damages." *Id.*, at 179-80.

The McDuffie case illustrates that society has a compelling interest in assuring that all parts of the community can be represented on juries. This means that neither the defense nor the prosecution should be permitted to use peremptory challenges to racially bias the jury.

> "Selection which is or even appears to be discriminatory obviously destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness. This is illustrated in the extreme by the impunity with which racial and civil rights crimes have been committed in the South." Kuhn, *Jury Discrimination: The Next Phase*, 41 S. Cal. L. Rev. 235, 246 (1968) (footnote omitted).

Peremptory challenges make a jury less representative and more homogeneous, as each side eliminates those who are thought to be hostile to its interests. J. Van Dyke, *Jury Selection Procedures* 168 (1977). Thus both the prosecution *and* the defense must be prevented from having their assumptions regarding group bias reflected in the final composition of the petit jury if the goals of *Batson* are to be achieved.

C. State Action.

State action is rarely an issue in constitutional criminal procedure. The prosecutor, police officer, judge, or legislature scrutinized in the typical criminal case is clearly a state actor. With the exception of searches by private individuals, see, *e.g.*, *Burdeau* v. *McDowell*, 256 U. S. 465 (1921), there is little authority on state action in criminal cases. While the state actor in criminal cases is almost always one of the traditional agents of the state, this does not limit state action to these sources. In the proper context, even the traditional foe of the state, counsel for the criminal defendant, can be a state actor. The peremptory challenge provides the context to find state action. What is necessary to keep in mind is that the act can be as important as the actor in determining state action. The peremptory challenge is such an act, transforming the traditional opponent of the state into a state actor.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law." *United States* v. *Classic*, 313 U. S. 299, 326 (1941). Ultimately, state action is a question of power: did the State lend power to the wrongdoer that allowed him to perpetuate his evil? The State does not have to discriminate itself; it only needs to use its power to allow the discrimination to happen. Thus, in *Shelley* v. *Kraemer*, 334 U. S. 1, 11 (1948), the fact that the only overt discrimination was committed by private parties was irrelevant. What mattered was that "but for the active intervention of the state courts" the discrimination would not have happened. *Id.*, at 19. This "active intervention" was the state court's enforcement of a racially restrictive covenant

made by private parties. As the covenant had no power to discriminate without the enforcement of the state court, the private source of the discrimination is irrelevant. "The difference between judicial enforcement and non-enforcement" of the private acts was the difference between whether the victims were or were not discriminated against. *Id.*

The present case is an even stronger example of state action. The discrimination in *Shelley* involved typically private conduct, the creation of a restrictive covenant. The discriminatory peremptory challenge comes up in the context of a traditional government function. As in *Shelley*, the challenge is meaningless without government sanction. As the discrimination is impossible without state help, the discriminatory challenge constitutes state action.

The "Jaybird Party" case is another demonstration of how a putatively private act becomes state action when the state provides the authority necessary to achieve the discriminatory goal. In *Terry* v. *Adams*, 345 U. S. 461 (1953), this Court, under the Fifteenth Amendment,[3] invalidated the discriminatory practices of the Jaybird Party. The Jaybird Party was a private club in Texas made up of all white registered voters in the state. They would hold elections several months before the Democratic primary. The winner of the Jaybird election would then run unopposed in the Democratic primary, which was tantamount to winning the general election. *Id.*, at 464 (lead opn. of Black, J.). The purpose of this scheme was to deprive blacks of any meaningful voice in Texas elections. *Id.*, at 463-464.

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3. Although the present case does not involve the Fifteenth Amendment, the Fifteenth Amendment also requires state action. Section one states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." Therefore, the state action analysis in *Terry* applies with equal force to the Fourteenth Amendment state action requirement in the present case.

Although the state of Texas had no official involvement in the act of discrimination, limiting party membership to whites, this Court still found state action. The lead opinion, written by Justice Black, first looked to the overwhelming sentiment of Congress and the Constitution to eliminate racial discrimination from the right to vote. *Id.*, at 465-469. Even though the Jaybird Party was private, the effect of its election was to bring "into being exactly the kind of election that the Fifteenth Amendment seeks to prevent." This parallels the present case. *Batson* and *Powers* prevent the removal of jurors for racial reasons. Defendants, by opposing Georgia's *Batson* motion, seek the freedom to achieve the result made unconstitutional in *Batson* and *Powers*—the peremptory removal of jurors because of their race.[4] "When it [private action] produces the equivalent of the prohibited election, *the damage has been done*." *Id.*, at 469 (emphasis added).

Because the effect of the Jaybird election was to achieve discriminatory elections, the fact that Texas did not control the party did not matter. *Id.*, at 469. The Jaybird Party became "indeed the only effective part, of the elective process . . . ." *Ibid.* Their discriminatory exclusion of blacks from a traditional civic right became state action.

Justice Frankfurter, in his concurrence, looked to the transfer of power from Texas to the Jaybird Party. "The state, in these situations, must mean not private citizens but those clothed with the authority and the influence official position affords." *Id.*, at 473 (Frankfurter, J., concurring). This did not, however, require a complete transfer of the machinery of government. "The vital requirement is state responsibility—that somewhere, somehow, to some extent there be an infusion of conduct by officials, panoplied with State power, into any scheme by which" people are deprived of their rights because of their race. *Ibid.*

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4. The present case involves a pretrial motion. Therefore, defendants have not made any discriminatory peremptory challenges. Immunizing them from *Batson* will give them a green light to discriminate later in the case.

The present case is the result of such a transfer of power. The peremptory challenge cannot be exercised by a criminal defendant without a grant of power from the state. See *Stilson* v. *United States*, 250 U. S. 583, 586 (1919), accord, *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 673, 111 S. Ct. 2077, 2083 (1991). While defendant and counsel actually oppose the machinery of government, see *Terry*, *supra*, 345 U. S., at 474 (Frankfurter, J., concurring), they use the needed grant of government power to achieve a result forbidden by *Batson*.

In *Terry*, the Jaybird Party's participation with the government in the scheme to deprive blacks of their rights was enough to cloak them in with state action. See *id.*, at 476-477. While defense peremptories may not have the same taint of conspiracy, there still is a transfer of power that brings about a result which is unconstitutional when attributed to the state. Whether it comes about as a result of a conspiracy, as in *Terry*, or from racially-neutral enabling statutes, as in the present case, does not change the transfer of power or the discrimination arising from the transfer.

In *Smith* v. *Allwright*, 321 U. S. 649 (1944), an earlier "white primary" case, this Court held that the Democratic Party of Texas was a state actor when it allowed only whites to vote in its primary. The State Democratic Party was heavily regulated by and involved with the government with respect to primary and general elections. *Id.*, at 662-663. This turned the party into a state actor when it determined who voted in primaries. "The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party." *Id.*, at 663. As Texas set up the machinery for the primary system, and limited the choice in the general election to the winners of the primaries, it adopted the party's discrimination. *Id.*, at 664.

This also fits the present case. While the Democratic Party was much more an agent of the government than a criminal defendant, both needed the government to supply the power

to allow each to discriminate. The system of regulation making the primary so important to the general election, see *id.*, at 664, provided the party with the power that it otherwise would not have to make its exclusion effective.

Terry and *Smith* both demonstrate that when ostensibly private actors deprive people of a key democratic right, their action will be attributed to the state and thus subject to the restrictions of the Constitution. In each instance, some grant of government power was *necessary* to achieve the private party's discriminatory ends. Whether the grant took the form of favorable state regulation or cooperation from government officials does not change the private party's dependence upon the state.

Discriminatory peremptory challenges by defense counsel play a closely analogous role. Defendants need state power to make the challenges. The Legislature gives them the power. Defendants then deprive citizens of a key democratic privilege, jury membership, due to race. Cf. *Powers*, *supra*, 113 L. Ed. 2d, at, 424, 111 S. Ct., at 1369. There is no fundamental difference between the white primaries and the present case.[5]

Edmonson v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 11 S. Ct. 2077 (1991) following the reasoning of *Shelley*, *Smith*, and *Terry*, eliminates any doubt that a peremptory challenge must constitute state action no matter which party exercises it. *Edmonson* dealt with a challenge made in a proceeding that supported the lowest level of government interest, an ordinary civil dispute between two private parties. 114 L. Ed. 2d, at

5. The fact that Texas encouraged the discrimination in *Terry* and *Smith* while the prosecution opposes any discrimination in the present case does not change the analysis. The prosecution is part of a tripartite system of government, the members of which are not supposed to act as one body. Cf. J. Madison, *The Federalist No. 47*, 301-307 (Rossiter ed. 1961). Here, the Georgia Legislature has provided defendants with the means to discriminate. Ga. Code § 15-12-165. While the Legislature did not intend for defendants to discriminate, this does not change defendants' reliance on the Legislature's grant of power.

670, 111 S. Ct., at 2080. The only connection the government had to this case was providing the forum and the procedure for resolving the litigants' dispute. In spite of the seemingly tangential relationship between the state and the litigants, the *Edmonson* Court held that a peremptory challenge made on behalf of a private civil litigant was state action.

The Court began its analysis with the most recent and comprehensive *Batson* case, *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991). *Powers*, along with *Batson*, was part of "over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process." *Edmonson*, *supra*, 114 L. Ed. 2d, at 672, 111 S. Ct., 2081-2082. These cases, while concentrating upon criminal matters, did not sanction discrimination in civil proceedings. 114 L. Ed. 2d, at 672, 111 S. Ct., at 2082. Discrimination in civil proceedings was just as harmful as that in criminal cases. In each "race is the sole reason for denying the excluded venire-person the honor and privilege of participating in our system of justice." 114 L. Ed. 2d, at 672, 111 S. Ct., at 2081-2082.

As the harm was the same regardless of the type of proceeding involved, the analysis of state action was virtually the same. The *Edmonson* Court began with a framework taken from *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 939-942 (1982). First, the Court looked to "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority." *Edmonson*, *supra*, 114 L. Ed. 2d, at 673, 111 S. Ct., at 2083. If the answer was yes, it would then ask "whether the private party charged with the deprivation could be described in all fairness as a state actor." 114 L. Ed. 2d, at 673, 111 S. Ct., at 2083.

The first part was clearly satisfied. Litigants are not entitled to peremptory challenges. They have "no significance outside a court of law" and exist only at the sufferance of the government. 114 L. Ed. 2d, at 673, 111 S. Ct., at 2083. The second part, whether civil peremptories were fairly attributable to the state, looked to three factors: 1) whether the act is a traditional function of government, 2) how much assistance the actor received from the government, and 3) whether the

injury is aggravated "by the incidents of government authority." 114 L. Ed. 2d, at 674, 111 S. Ct., at 2083. The first two factors were satisfied by the close relationship between the government and peremptory challenges. 114 L. Ed. 2d, at 674-676. The third factor, aggravation of harm, was satisfied because the challenge and the discrimination associated with it occurred within the courtroom, raising questions about the integrity of the judicial system and its democratic ideals. 114 L. Ed. 2d, at 678, 111 S. Ct., at 2087.

Edmonson compels a finding of state action in the present case. The difference between criminal defendants and civil litigants does not alter the analysis set forth in *Edmonson*. It does not change the dependence upon government. Criminal defendants have no constitutional right to peremptory challenges; the challenge is a privilege granted by government. See *Stilson* v. *United States*, 250 U. S. 583, 586 (1919). Nor does it change the aggravation of harm. The juror will still feel slighted, and the process will still be questioned regardless of who challenges the juror. Finally, the peremptory challenge is even more a traditional government function in criminal than civil cases. At the common law, peremptory challenges were not allowed in civil trials, they were only used for felony cases. See 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1st ed. 1769).

In finding state action, the *Edmonson* Court encountered only one minor obstacle. In *Polk County* v. *Dodson*, 454 U. S. 312, 314 (1981), a convicted criminal sued his public defender under 42 U. S. C. § 1983,[6] alleging that the public defender's

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6. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

representation of his case on appeal violated his civil rights. This confronted the Court with the issue of whether a public defender acts "under color of state law" when representing a criminal defendant. The *Dodson* Court concluded that the fact that a state paid for an attorney's services does not make it liable for his alleged incompetence. To be under color of state law, an actor had to be "exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.*, at 317-318 (quoting *United States* v. *Classic*, 313 U. S. 299, 326 (1941)). The public defender's obligations to his client in no way derived from the state's appointment. "Except for the source of payment, their relationship became identical to that existing between any other lawyer and client." *Id.*, at 318.

The *Dodson* Court dealt with an attack on the representation provided by the public defender. *Id.*, at 314. As the attack occurred at this highest level of generalization, the *Dodson* Court dealt with the most basic function performed by the public defender. The *Dodson* Court could not find that all of the public defender's representation constituted state action. Making everything a public defender does in his role as counselor is contrary to the nature of his duties as "personal counselor and advocate." See *id.*, at 318-319.

This does not, however, prevent more specific acts of defense counsel from being state action. Summarily calling any action of defense counsel private exalts form over function. As the *Edmonson* decision demonstrates, a court must look to what the alleged wrongdoer is doing, as well as who that person is.

The key to applying *Dodson* is to distinguish between a person's employment relationship with the government and what the person actually does. The *Edmonson* Court understood that this was the essence of *Dodson*. *Edmonson* noted the different roles played by civil and criminal defense attorneys. While defense counsel's role was to oppose the government "an adversarial relationship does not exist between the government and a private litigant." *Edmonson*, 114 L. Ed. 2d, at 677, 111 S. Ct., at 2086.

The crucial factor behind the distinction was what private counsel did in *Edmonson*. "The selection of jurors represents a unique government function delegated to private litigants by the government and attributable to the government for the purposes of invoking constitutional protections against discrimination by reason of race." 114 L. Ed. 2d, at 677, 111 S. Ct., at 2086. This is what the *Dodson* court meant by looking to what the actor does instead of what he is. It is the actor's "function within the state system, not the precise terms of his employment, that determines whether his actions can be fairly attributed to the State." *West* v. *Akins*, 487 U. S. 42, 55-56 (1988).

The same reasoning that found private counsel to be a state actor in *Edmonson*, and made the representation by a public defender private acts in *Dodson*, mandates a finding of state action in the present case. The difference between *Dodson* and the present case is that different functions of counsel are examined in each case. The plaintiff in *Dodson* attempted to attribute the entirety of his public defender's representation to the state. Yet the state cannot interfere with the vast bulk of this attorney-client relationship. "Indeed, an indispensable element of the effective performance of his [defense counsel's] responsibilities is the ability to act independently of the Government and oppose it in adversary litigation." *Ferri* v. *Ackerman*, 444 U. S. 193, 204 (1979). The government is both constitutionally required to provide the indigent criminal defendant with counsel, *Gideon* v. *Wainwright*, 372 U. S. 335, 344-345 (1963), and prevented from interfering with the attorney-client relationship in criminal cases, see, *e.g.*, *Massiah* v. *United States*, 377 U. S. 201, 205-206 (1964). Finding state action in *Dodson* would put government in a Catch-22 situation. It would have to pay for counsel's mistakes even though it exercised no control over his actions. This runs contrary to the principles behind vicarious liability, see *General Building Contractors* v. *Pennsylvania*, 458 U. S. 375, 392 (1982), and thus was properly rejected in *Dodson*.

The present case deals with a much narrower activity. Only counsel's peremptory challenges are subject to scrutiny. Furthermore, unlike *Dodson*, only the person doing the wrong, the defense, will suffer the consequences, a denied peremptory challenge. The *Edmonson* Court best summed up the difference between the two circumstances:

> "Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state action. That cannot be said of the exercise of peremptory challenges, however; *when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance*." 114 L. Ed. 2d, at 678, 111 S. Ct., at 2086-2087 (emphasis added).

Thus defense peremptories may be limited while still preserving *Dodson*. The relationship between defense counsel and client and the tactical decisions that the attorney makes during the representation are still private rather than state action. Only the peremptory challenge, because of its special relationship with government, will be subject to constitutional scrutiny.

D. Section 243.

Federal civil rights law also supports applying *Batson* to the defense. 18 U. S. C. § 243 makes it a crime for "whoever, being an officer or other person charged with any duty in the selection or summoning of jurors" to exclude or fail to summon a citizen for jury service because of the citizen's race. The statute is sweeping in scope, embracing the entire process of jury selection and every actor in it. It covers *any* person charged with *any* duty in the process.

Defense counsel are well within the statute. They are charged with a duty to conduct *voir dire* and jury selection in the interests of their clients. See ABA Model Rules of Professional Conduct Rule 1.3 comment ¶ 1 (1983) ("zeal in advocacy"); ABA Model Code of Professional Responsibility DR 7-

101 (1980); C. Wolfram, *Modern Legal Ethics* 578-579 (1986). Section 243, however, limits this function. If an attorney excludes any citizen on account of race, that attorney has violated the statute.

This Court has relied on this statute to extend protection against jury discrimination when defendant and the excluded juror are of the same race, see *Peters* v. *Kiff*, 407 U. S. 493, 507 (1972) (White, J., concurring); *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 423-424, 111 S. Ct. 1364, 1369 (1991) and against jury discrimination in civil cases, see *Edmonson*, *supra*, 114 L. Ed. 2d, at 680, 111 S. Ct., at 2088. In *Peters*, the concurrence felt that the statute alone was enough to justify allowing a white defendant to challenge the exclusion of blacks from the jury system. *Peters*, *supra*, 407 U. S., 506-507 (White, J., concurring). This reasoning could just as easily extend the statutory prohibition against discriminatory peremptories to a private person. The constitutionality of congressional prohibition of private discrimination is well established. See, *e.g.*, *Runyon* v. *McCrary*, 427 U. S. 160, 179 (1976).

The *Edmonson* decision is similarly illuminating with regards to the importance of § 243.

> "Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. See *Thiel* v. *Southern Pacific Co.*, 328 U. S., at 220, 90 L. Ed. 2d 1181, 66 S. Ct. 984, 166 A. L. R. 1412. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 U. S. C. § 243; 28 U. S. C. §§ 1861, 1862. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." 114 L. Ed. 2d, at 680, 111 S. Ct., at 2088.

If defense counsel use peremptories to exclude jurors for racial reasons, they are committing a federal crime. The prosecution should be allowed to stop them before they violate section 243.

E. Third Party Standing.

A party usually may raise only his own claims. *Singleton* v. *Wulff*, 428 U. S. 106, 113 (1976). Third party standing is allowed, however, under the proper circumstances. *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991) and *Edmonson* v. *Leesville Concrete Co.*, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991) leave no doubt that the prosecution can raise a juror's equal protection claim in the present case. In each case, this Court found that opposing counsel could raise the equal protection claim on behalf of excluded jurors. In *Powers*, this Court noted that third party standing ordinarily was not allowed, but that it will be granted where: 1) the litigant suffers actual injury giving him a sufficient interest in the outcome of the dispute, 2) "the litigant [must have] a close relation to the third party," and 3) "there must exist some hinderance to the third party's ability to protect his or her own interests." *Powers*, *supra*, 113 L. Ed. 2d, at 425, 111 S. Ct., at 1370-371. This test was adopted in *Edmonson*, 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087. In each case, third party standing was granted. *Powers*, *supra*, 113 L. Ed. 2d, at 428, 111 S. Ct., at 1373; *Edmonson*, *supra*, 114 L. Ed. 2d, at 680, 111 S. Ct., at 2088.

In *Powers*, this Court engaged in a lengthy examination of all three factors before finding third party standing. 113 L. Ed. 2d, at 425-428, 111 S. Ct., at 1370-1373. The *Edmonson* Court required much less effort to find third party standing. It found the second and third parts of the test were satisfied in the same way as in *Powers*. In each case, the excluded juror faces substantial barriers to enforcing his rights through civil action. 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087. The same argument applied to the relationship between the excluded juror and the party. The fact that one case was civil and the other was criminal was irrelevant to the close relationship between the party and juror. 114 L. Ed. 2d, at 679, 111 S. Ct., at 2087.

The present case satisfies the second and third parts as readily as did *Powers* and *Edmonson*. The fact that it was the criminal defense that excluded a juror is irrelevant to the difficulty an individual juror has in securing vindication. Similarly,

the prosecution develops just as close a relationship to the excluded juror as did the defense in *Powers* and the civil party in *Edmonson*. The fact that the prosecution is bringing the claim simply does not matter.

The *Edmonson* Court spent a little more time on the first part, whether the litigant was injured enough to warrant raising the third party claim. It decided that a civil litigant's interest in the justice of the verdict and the integrity of the system gives the civil litigant sufficient interest to pursue the excluded juror's claim. 114 L. Ed. 2d, at 679-680, 111 S. Ct., at 2087-2088.

The interests of the prosecution in the justice of verdicts and the integrity of the system are even greater than those of the civil litigants in *Edmonson*. Verdicts tainted by jury discrimination call into question the integrity and justice of the judicial system. *Batson*, *supra*, 476 U. S., at 87; *Rose* v. *Mitchell*, 443 U. S. 545, 556 (1979). This calls into question " '[t]he most basic function of any government': 'to provide for the security of the individual and his property.' " *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983) (quoting *Miranda* v. *Arizona*, 384 U. S. 436, 539 (1966) (White, J., dissenting)). The effect of this loss of respect for the system can be catastrophic, as the city of Miami learned after the McDuffie case.[7] The prosecution's interest in preserving the integrity of the system is thus paramount, satisfying the first part of the *Powers* test. As the prosecution therefore has third party standing, and as state action is present, there is no barrier to preventing the defense from using discriminatory peremptory challenges.

III. Defendants' interest in peremptory challenges do not justify immunizing them from *Batson*.

Every litigant wants peremptory challenges, and no litigant wants to be constrained while exercising them. Peremptories

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7. See part I, B, 2, *ante*, at 13.

free the definition of bias from the narrow definition of cause given in most jurisdictions. Furthermore, it allows counsel to conduct more effective *voir dire*. If counsel is worried that he has offended a juror by probing too much on *voir dire*, he can cure this by peremptorily challenging the offended juror. See *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965); 4 W. Blackstone, *Commentaries in the Laws of England* 346-347 (1st ed. 1769).

For all its utility, there is nothing sacred about the peremptory challenge. It is well-settled that the Constitution does not guarantee a criminal defendant peremptory challenges; any entitlement to a peremptory comes through a grant from the State. *Stilson* v. *United States*, 250 U. S. 583, 586 (1919); *Batson* v. *Kentucky*, 476 U. S. 79, 91 (1986). Whatever utility peremptories have, they are subject to the demands of the Equal Protection Clause. *Powers* v. *Ohio*, 113 L. Ed. 2d 411, 424, 111 S. Ct. 1364, 1369 (1991).

There are three ways to attack subjecting defense peremptories to *Batson*. One method is the Sixth Amendment's impartial jury guarantee. Cf. *Stilson*, *supra*, 250 U. S., at 586. But under the Sixth Amendment a "trial by an *impartial* jury is all that is secured." *Id.* (emphasis added). This Court has not found that the Sixth Amendment's impartiality requirement compels peremptory challenges. See *Holland* v. *Illinois*, 107 L. Ed. 2d 905, 917-918, 110 S. Ct. 803, 808-809 (1990).

The second avenue is due process. Cloaking the peremptory challenge in the Due Process Clause to remove it from *Batson* runs contrary to this Court's due process jurisprudence, and could upset limits on defense peremptories imposed by several states.

It is true that peremptory challenges on behalf of defendant have a long history, stretching back to early common law. See *Swain*, *supra*, 380 U. S., at 212-216. Due process does not, however, lock us into the common law. While adherence to common law procedures may be sufficient to satisfy due process, it is not always necessary to follow the common law. See *Holland*, *supra*, 107 L. Ed. 2d, at 917-918, n. 1, 110 S. Ct., at 808; *Hurtado* v. *California*, 110 U. S. 516, 528-529 (1884).

As the peremptory challenge has never before been considered a constitutional guarantee, and as the Equal Protection Clause already mandates limiting defense peremptories,[8] there is no reason to use due process to shield defendant from *Batson*. Since justice is due the accuser as well as the accused,[9] it is contrary to all notion of due process to use it to give defendant an unfair advantage over the prosecution in molding the jury.[10]

Finally, several states have used their own constitutions to eliminate race-based defense peremptories. See, *e.g.*, *Commonwealth* v. *Soares*, 387 N. E. 2d 499, 517, n. 35 (Mass. 1979); *State* v. *Neil*, 457 So. 2d 481, 487 (Fla. 1984); *People* v. *Wheeler*, 583 P. 2d 748, 765, n. 29 (Cal. 1978); *People* v. *Kern*, 554 N. E. 2d 1235 (N.Y. 1990). These decisions would be upset by any use of due process or the Sixth Amendment to shield defendants from *Batson*. Any state constitutional limit on defendants would be overridden by this Court's interpretation of the federal Constitution.

The last argument to be raised against subjecting defendants to *Batson* will be the nemesis of constitutional law—practicality. When the Constitution demands this Court to decide in a certain way, it must do so, regardless of any policy implications. Here the Equal Protection Clause and 18 U. S. C. § 243 mandate that defendant not exercise racially-biased peremptory challenges—whether this will doom peremptory challenges or whether peremptory challenges are worth saving is irrelevant to this question. Any policy favoring defense peremptories has no constitutional standing.

Even so, California's experience demonstrates that limiting defendants' peremptories will not destroy them. In *People* v. *Wheeler*, *supra*, the California Supreme Court recognized that defense peremptory challenges pose a threat similar to those of the prosecution and therefore indicated that the defense would be held to the same standard as the prosecution in making peremptory challenges. 583 P. 2d, at 765, n. 29; see also *People* v. *Snow*, 746 P. 2d 452, 459 (Cal. 1987) (Eagleson, J., concurring). This holding did not doom defense peremptories.

In the thirteen years since *Wheeler*, objections by the prosecution have not been a substantial source of litigation. *People* v. *Pagel*, 232 Cal. Rptr. 104 (Cal. App. Supp. 1986), cert. denied, 481 U. S. 1028, appears to be the only reported case. Where the objection is needed, however, as in *Pagel*, the Howard Beach case, or the McDuffie case,[11] it is extremely important that it be available.

CONCLUSION

The judgment of the Georgia Supreme Court should be reversed.

Dated: December, 1991

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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8. See part I, *ante*, at 3-4.

9. See *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934).

10. See part I, A, *ante*, at 4-6.

11. See part I, B, 2 *supra*, at 13.

(8)

No. 91-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS MCCOLLUM *et al.*

Respondent.

On Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE SUGGESTING REVERSAL

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE SUGGESTING REVERSAL

Interest of Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation organized under the laws of the State of New York as a legal aid society. It was formed

*Letters of consent from the parties to the filing of this brief have been lodged with the Clerk of Court.

to assist African Americans to secure their constitutional and civil rights through the courts. For many years, its attorneys have represented parties and appeared as amicus curiae in this Court and in the lower federal courts on a broad range of issues including both the substantive and procedural law relevant to cases of racial discrimination.

Of particular concern to the Legal Defense Fund has been racial discrimination against African Americans in the selection of juries. The Fund has represented criminal defendants raising jury discrimination on direct appeal, *e.g.*, *Alexander v. Louisiana*, 405 U.S. 625 (1972), and has represented potential African American jurors who have been excluded from jury service, *e.g.*, *Turner v. Fouche*, 396 U.S. 346 (1970). LDF attorneys handled *Swain v. Alabama*, 380 U.S. 202 (1965) and participated as amicus curiae in *Batson v. Kentucky*, 476 U.S. 79 (1986). In light of LDF's historic concern with and involvement in jury issues, we believe our views will be of assistance to the Court.

SUMMARY OF ARGUMENT

I.

The question of whether the use of peremptory challenges by a criminal defendant to exclude potential jurors because of their race must be decided in light of the central purpose of the Fourteenth Amendment.

II.

In deciding the question, there are a number of competing interests embodied in the Fourteenth Amendment that must be carefully weighed. These include the right of jurors not to be excluded because of race, the right of a defendant to a fair and impartial jury free of racially prejudiced jurors, the right to a fair possibility of obtaining a representative jury, and the central role of the jury in preventing prosecutorial abuse. When these factors are given proper weight, it is clear that the same rule that bars prosecutors from excluding jurors because of their race should not automatically be applied to all defendants. It is further clear that whether white defendants can use

peremptory challenges to purge minority jurors presents quite different issues from whether a minority defendant can strike majority group jurors.

III.

Whether a prima facie case of racial discrimination in the exercise of peremptory challenges has been established may vary significantly depending on the race of the jurors excluded. The use of all of a defendants' peremptories to strike majority-group jurors, where it is impossible to produce a jury on which there will be no such jurors sitting, presents a far different issue than the use of peremptories to strike all minority jurors, thus producing a monochromatic jury.

ARGUMENT

Introduction

The Legal Defense Fund suggests that if the decision below is reversed, that holding should be based on the particular facts of this case, viz., the defendants are accused of a crime that involves racial animus and allegedly will use peremptory challenges to strike from the jury members of the very minority group they have been charged with victimizing.[2] The purpose of this brief is to bring to the Court's attention a number of concerns involved in deciding a much broader issue, viz., whether and in what way the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986) and extended in *Edmonson v. Leesville Concrete Co.*, 500 U.S. __, 114 L.Ed.2d 660 (1991), applies to all criminal

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[2]A core concern of the Fourteenth Amendment's Equal Protection Clause is that the outcome of a criminal case not depend on the race of the victim or the perpetrator. This means both that a defendant not be subject to different penalties because of *his* race (42 U.S.C. § 1981), and that the victim of a crime does not lack redress because of the race of the accused. If a white defendant uses peremptories to create an all-white jury that sanctions a crime against African Americans, that result violates key Fourteenth Amendment values.

defendants when they exercise peremptory challenges.

I. THE PRINCIPLES UNDERLYING *BATSON V. KENTUCKY*

In *Batson* this Court turned to those "first principles" that resulted in the holding that the exclusion of African Americans from jury service violated the Fourteenth Amendment. Citing *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court held:

> Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."

476 U.S. at 87-88. As *Strauder* itself further explained, the exclusion of African American citizens because of their race "is practically a brand upon them, affixed by the law; an assertion of their inferiority." 100 U.S. at 308. Such a practice violates the rights of African Americans "for whose protection the [Fourteenth] Amendment was primarily designed." *Id.*, at 307.

We do not mean to suggest that a similarly *invidious* discrimination against potential white jurors might not also violate the Constitution, and *Strauder* so recognizes. *Id.*, at 308.[3] However, the question of whether the exclusion of members of a particular group by a defendant exercising peremptory challenges does run afoul of the Fourteenth Amendment must be determined in light of the central purpose of the Amendment and of the several distinct and potentially conflicting constitutional interests involved.

II. THE APPLICATION OF *BATSON/EDMONSON* TO CRIMINAL DEFENDANTS DEPENDS ON WEIGHING COMPETING FACTORS.

Amicus urges that the resolution of this case does not simply involve the application of the state action analysis of *Edmonson*, a civil case, to a criminal prosecution. Rather, there are several different equal protection/due process

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[3]"If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws." *Id.*

concerns to be considered and reconciled.

1. The Right of Jurors.

Each juror has the right to be free from invidious racial discrimination when the decision whether he or she shall sit is made and enforced by the trial court. See *Batson*, 476 U.S. at 87; *Edmonson*, 114 L.Ed.2d at 676-679.

2. The Right of a Defendant to an Unbiased Jury.

A criminal defendant has the right not to be tried by a racially biased jury. *Aldridge v. United States*, 283 U.S. 308 (1931); *Ham v. South Carolina*, 409 U.S. 524 (1973). Often, voir dire and challenges for cause are not enough to protect a defendant, and a minority defendant faced with the possibility of biased white jurors must have recourse to peremptory challenges.

In theory there is a distinction between a race-based peremptory challenge used to discriminate invidiously in violation of *Batson*, and a peremptory challenge used to prevent discrimination by removing a juror whom the defendant believes harbors racial prejudice. In practice,

however, it may often be difficult for the trial court to distinguish between the two cases, just as often the voir dire, if the circumstances of the case do not permit a searching inquiry into racial prejudice,[4] may not be able to elicit sufficient proof of bias to permit a challenge for cause. Whatever the injury to a prospective juror of being excluded from a particular jury, the injury to a defendant by being tried by a jury infected with racial prejudice is far greater.

3. The Right to a Representative Jury.

The Sixth and Fourteenth Amendments guarantee to each criminal defendant "a fair possibility for obtaining a representative cross-section of the community" on the jury that tries him. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The ability to use peremptory challenges to exclude majority race jurors may be crucial to empaneling a fair jury. In many cases an African American, or other minority defendant, may be faced with a jury array in which his racial group is

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[4]See *Ristaino v. Ross*, 424 U.S. 589 (1976).

underrepresented to some degree, but not sufficiently to permit a challenge under the Fourteenth Amendment.[5] The only possible chance the defendant may have of having any minority jurors on the jury that actually tries him will be if he uses his peremptories to strike members of the majority race.

This use of peremptory challenges, we submit, is not invidious discrimination in violation of the Fourteenth Amendment. Its purpose is not, as in *Strauder* and *Batson* to *exclude* persons because of their race or to rid a jury of all members of a particular racial group because of animosity towards them (an impossible goal when it is members of the majority that are being struck), but rather to *include* persons who would otherwise not sit. While we recognize that a defendant has no absolute right to have members of his race on the actual jury that tries him in the sense that there is a violation of the Constitution if there are not,[6] we do submit

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[5]See, *e.g.*, *Swain v. Alabama*, 380 U.S. 202, 206-09 (1965).

[6]*Holland v. Illinois*, 493 U.S. __, 107 L.Ed.2d 905 (1990).

that the use of peremptories to produce a representative jury is fully consistent with both the Fourteenth and the Sixth Amendments.

5. The Role of Juries in Preventing Prosecutorial Abuse.

A jury is provided in a criminal prosecution under the Sixth and Fourteenth Amendment as a right of defendants, in part to serve as a check on prosecutorial abuse. Thus, a jury may be the only effective protection against racial discrimination by prosecutors in deciding, for example, what crime to charge or what penalty to seek. Cf. *McClesky v. Kemp*, 481 U.S. 279. 309-11 (1987). The likelihood that a jury will in fact perform this role may depend in part on its racial composition, *i.e.*, to the extent it fairly represents the community as a whole by including members of the group from which the defendant comes. Where a minority group is a small proportion of the community, in a particular case the only chance of reaching minority members of the panel may be through the use of peremptory challenges to strike some members of the

majority group.

6. Summation.

Many of the factors discussed above do not apply when a prosecutor is exercising the state's peremptory challenges. Thus, the state does not have a constitutional right to a jury trial, and it has the same interest as does the victim of a crime in ensuring that the criminal justice system operates in a race-neutral fashion. Further, 18 U.S.C. § 243 makes it a federal crime for a state officer "charged with any duty in the selection . . . of jurors" to exclude any citizen "on account of race." By its literal terms, the statute applies to the use of peremptory challenges by a prosecutor to exclude African Americans because of their race.

In addition, when these various factors are weighed, it is apparent that whether and to what extent the *Batson/Edmonson* rule applies to criminal defendants will depend greatly on the circumstances of the particular case. For a white defendant to practice invidious discrimination by striking all African Americans from the jury that will try him

for a racially motivated crime against an African American, presents different issues from the case of an African American defendant who uses peremptories in an attempt to have some members of his race on the jury that will try him. As we will now demonstrate, these different circumstances also will result in differences in the way *Batson* is applied in practice.

III. THE APPLICATION OF *BATSON/EDMONSON* IN PRACTICE.

Assuming that *Batson* does apply in some way to the use of peremptories by a criminal defendant, there are three key considerations affecting whether the use of peremptories creates a prima facie case, as well as the weight of that case and what considerations are sufficient to overcome it. In some cases, a finding of even a prima facie case would be clear error, while in others the prima facie case would be so compelling that it could only be overcome with extraordinary

evidence.[7]

First, if a venire is ninety per cent white, or other majority group, one would expect that peremptories exercised without regard to race would be mostly against whites. For example, if a litigant used ten peremptories against ten whites, that could happen by chance in a significant number of instances. Therefore, no inference of discrimination could be drawn from that fact alone. If, on the other hand, a litigant used ten peremptories against ten African Americans where the venire is ninety per cent white and ten per cent African American, a strong inference of discrimination could be drawn.[8]

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[7]See *Alexander v. Louisiana*, 405 U.S. 625 (1972) for one of many examples of an irrefutable case of jury discrimination made by a clear pattern of exclusion coupled with the opportunity to discriminate based on race. See also *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face"), and *id.* at n. 13.

[8]If peremptories were exercised randomly, one would expect that nine would be used against whites and one against African Americans. The use of one more peremptory against whites for a total of ten is not a substantial deviation from what one would expect; the use of all ten against African Americans is, however.

Second, a related factor is whether the litigant was in a position to and did he actually produce a one-race (or virtually one-race) jury. If a litigant uses peremptories to sweep all minorities from the venire, the "monochromatic result" can establish a prima facie case. *Alexander v. Louisiana*, 405 U.S. at 632. Conversely, if a litigant is sure to get a jury that is heavily white no matter how peremptories are used, the litigant is likely to have been using strikes for some other reason other than race.

Third, whether the excluded jurors were members of an historically discriminated against group, and particularly a group historically underrepresented on jury rolls, is highly significant. Thus, a purge of all African Americans from a jury sitting in Mississippi[9] or all Hispanic Americans from a jury sitting in Texas[10] is far more probative of invidious discrimination on the part of the litigant (or his or her

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[9] *Patton v. Mississippi*, 332 U.S. 463 (1947)(no African Americans called for jury service within the last thirty years).

[10]*Hernandez v. Texas*, 347 U.S. 475 (1954)(no Hispanic Americans called for jury service for last twenty-five years).

attorney) than the striking of some whites in Minnesota.

Not only is establishing a prima facie case where the defendant's group is a minority in the community and on the jury rolls far more difficult and problematic, but the rebuttal of a prima facie case even when made is a lesser burden than when a prosecutor or a private litigant strikes minority jurors. With regard to a prosecutor, *Batson* makes it clear that the use of peremptories to exclude minority jurors because of preconceptions about how they would decide a case can never be justified. A minority defendant, however, is powerless to purge the jury of whites; the only possible uses of the peremptory against potential white jurors are either to strike those for whom some basis for suspecting bias exists, or to attempt to reach African Americans on the venire so that they may sit on the jury. Neither purpose is either invidious nor unconstitutional, but is related to the compelling state interest of providing the defendant with a jury that represents the community and is truly fair and impartial.

CONCLUSION

The considerations set out in this brief militate against a decision that treats all defendants, whether white, African American, or other minority, as if their circumstances are necessarily the same. A holding that *Batson v. Kentucky* prohibits the respondents here from striking African Americans from the jury that will try them does not compel a broader ruling.

For the foregoing reasons, amicus suggests that the decision of the court below should be reversed, but the basis of that reversal be limited to the facts of this case.

Respectfully submitted,

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(9)

No. 91-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF GEORGIA,

Petitioner,

—against—

THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF FOR CHARLES J. HYNES, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK IN SUPPORT OF PETITIONER

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December 19, 1991

QUESTION PRESENTED

Whether the United States Constitution prohibits a criminal defendant from exercising his peremptory strikes in a racially discriminatory manner.

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AUTHORITY TO FILE BRIEF AMICUS CURIAE

Charles J. Hynes, District Attorney of Kings County, New York, files this brief *amicus curiae* with the consent of the attorneys for the petitioner and the respondent, pursuant to Rule 36.2. Moreover, he is the authorized law officer of a political subdivision of a state, and therefore also files this brief *amicus curiae* pursuant to Rule 36.4.

STATEMENT OF INTEREST OF AMICUS CURIAE

Charles J. Hynes is the District Attorney of Kings County, New York. On March 29, 1990, the New York Court of Appeals ruled that criminal defendants in New York would no longer be able to exercise peremptory challenges on the basis of race. *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647, *cert. denied*, 111 S.Ct. 77 (1990). *Amicus*, as the Special State Prosecutor for the Howard Beach Incident, tried the *Kern* case in 1988 and was one of the first prosecutors in the state of New York to obtain a ruling from a trial court that applied this Court's *Batson* prohibition to criminal defendants.

Like many cases in which criminal defendants seek to strike all members of a particular racial group from the jury, the *Kern* case involved a racial assault. In that case, a mob of eleven young white men attacked three African-American men whose car had broken down near the Howard Beach section of Queens, New York. This attack culminated in the death of one of the African-American men, who was forced onto a multi-lane highway and fatally struck by a car in his attempt to flee from the bat-wielding mob of young white men.

In addition to *amicus'* personal experience, the Office of the Kings County District Attorney has supported and promoted the prohibition against the racial use of peremptory challenges for more than a decade and has consistently urged that the prohibition be applied to both criminal defense counsel and prosecutors. *See, e.g.*, Brief for Kings County District Attorney as *Amicus Curiae*, *Batson v. Kentucky*, 476 U.S. 79 (1986); Brief for Respondent, *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded for reconsideration in light of Batson*, 478 U.S. 1001 (1986).

Thus, *amicus* has had years of experience with judicial prohibitions on the use of peremptory challenges by criminal defense counsel to exclude potential jurors on the basis of race, both at the trial level as the prosecutor in a racially-

charged case which received national media attention and, since January 1990, as a District Attorney responsible for overseeing several thousand trials each year in a multi-racial, multi-ethnic county. Based on that experience, *amicus* has observed that defense counsel frequently attempt to use the peremptory challenge to exclude potential jurors on the basis of race, particularly in the most racially volatile of cases. Such discrimination is equally widespread, equally threatening to constitutional values, and equally amenable to judicial control as was the discrimination by prosecutors banned by this Court in *Batson* and the discrimination by civil counsel banned in *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991). For these reasons, *amicus* urges the Court to hold that the ban applies not only to prosecutors and civil litigants, but also to criminal defendants.

SUMMARY OF ARGUMENT

The exercise of race-based peremptory challenges by criminal defendants and their attorneys represents the last vestige of officially-tolerated racial discrimination in the selection of jurors in this country. The time has arrived for such discrimination to be eliminated once and for all.

Numerous state courts have recognized that public confidence in the fairness of criminal proceedings is compromised by *any* discrimination in the courtroom. Acting pursuant to their state constitutions, these courts have ruled that criminal defendants have no greater license to violate the Equal Protection rights of prospective jurors than have prosecutors.

The federal Constitution also forbids criminal defendants from excluding prospective jurors from service on the basis of race. First, the exercise of peremptory challenges incontrovertibly constitutes state action. Peremptory challenges occur in a public courtroom, during the course of a public trial, and in the performance of a quintessentially governmental function: the provision of petit juries in criminal trials. Additionally, they are enforced by judges and work a deprivation

upon citizens whose appearance for jury service has been compelled by the State. Second, a prosecutor in a criminal case, by virtue of his or her duties and relationship with the challenged jurors, has standing to uphold the rights of these jurors to be free from invidious discrimination. Finally, a defendant's Sixth Amendment rights to a fair trial and the assistance of counsel do not include any subsidiary right to discriminate in the selection of a jury.

Accordingly, this Court should now hold that *Batson* applies with equal force to the prosecution and the defense.

POINT I

EXPERIENCE IN THE COURTS OF NEW YORK AND OTHER JURISDICTIONS HAS LED TO THE RECOGNITION THAT A RACE-BASED PEREMPTORY CHALLENGE, REGARDLESS OF WHO EXERCISES IT, HARMS NOT ONLY THE CHALLENGED JUROR, BUT THE ENTIRE COMMUNITY

During the early morning hours of December 20, 1986, three African-American men whose car had broken down near the Howard Beach section of Queens, New York, were chased by a mob of bat and stick-wielding white youths, screaming racial epithets. One of the African-Americans was pursued until he was forced onto a six-lane highway where he was struck by a car and killed. A second was severely beaten. The third managed to escape without injury. Public apprehension about the fairness of the investigation and prosecution led to the appointment of *amicus* as Special Prosecutor to replace the Queens County District Attorney. Nine white youths eventually were convicted for acts they committed during the Howard Beach incident.

During the first case to go to trial, the defense challenged for cause or peremptorily every African-American prospective juror. On the prosecutor's motion, defense counsel was ultimately required by the court to offer race-neutral reasons for

the final three peremptory challenges. One challenge was disallowed and the juror seated.

The three defendants convicted at this trial argued to the New York Supreme Court, Appellate Division, Second Department, that "when a defense lawyer reasonably believes that blacks-qua blacks (or for that matter whites qua whites or greens qua greens) are more likely to convict his client based upon specific race-related issues in a particular case, he must exercise whatever lawful means are available to him to strike such jurors from the panel." Brief for Appellant, *People v. Kern*, 149 A.D.2d 187, 545 N.Y.S.2d 4 (2d Dep't 1989). A defense attorney in that case publicly defended race-based peremptory challenges: "I want the best for an acquittal. And any lawyer who tells you otherwise is a damn liar." *See* Cheever, *Defense Jeers Ruling Denying Peremptories in Howard Beach*, Manhattan Lawyer, October 6-12, 1987, at 5, col. 4.

In affirming the convictions of these three defendants, the Appellate Division rightly rejected these assertions:

> [P]eremptory challenges exercised solely on the basis of race, whether it be by the prosecution or the defense, necessarily result in injury not only to the excluded juror but to the community-at-large and to society's confidence in and respect for our system of justice. . . . [T]he courts cannot permit such conduct; justice cannot remain blindfolded, but rather must proclaim and insist that the guarantee of equal protection against all forms of racial discrimination, particularly in our system of justice, be enforced.

Kern, 149 A.D.2d at 235, 545 N.Y.S.2d at 34.

The New York Court of Appeals subsequently affirmed the decision of the Appellate Division and, quoting *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986), wrote, in part:

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection proce-

> dures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.' By their application to restrict defense peremptory challenges, the People have asserted the rights both of excluded jurors and the community-at-large.

People v. Kern, 75 N.Y.2d 638, 654, 554 N.E.2d 1235, 1243-1244, 555 N.Y.S.2d 647, 655-56, *cert. denied*, 111 S.Ct. 77 (1990) (citations omitted).[1]

Unfortunately, the problem of discrimination in jury selection is not unique to the Howard Beach case. One prominent defense attorney in New York, identified as a member of the board of directors of the National Association of Criminal Defense Lawyers, has asserted that the Constitution gives defendants—and their attorneys—the right to be racist: "I'm not prejudiced, but if I want to be, it's perfectly legal. Now, tell me, how can a judge tell a defendant that he can't be prejudiced?" Cheever, *supra*, at 38, col. 3. In the instant case, the defendants told the Georgia Supreme Court that, since a notice about the crime had been circulated in the black community, they were entitled to challenge black jurors

1 Even before the New York State appellate courts had definitively ruled on the issue, every New York criminal trial judge to address the issue had ruled that *Batson* applied to defense counsel, basing his or her decision on state constitutional and common-law grounds, as well as the Fourteenth Amendment to the federal Constitution. *People v. Muriale*, 138 Misc.2d 1056, 1066, 526 N.Y.S.2d 367, 374 (Sup. Ct. Kings Co. 1988), *appealed on other grounds*, 159 A.D.2d 651, 553 N.Y.S.2d 39, (2nd Dep't), *lv. denied*, 76 N.Y.2d 740, 558 N.Y.S.2d 902, 557 N.E.2d 1198 (1990); *People v. Gary M.*, 138 Misc.2d 1081, 1089-90, 526 N.Y.S.2d 986, 994 (Sup. Ct. Kings Co. 1988); *People v. Davis*, 142 Misc.2d 881, 888-891, 537 N.Y.S.2d 430, 434-36 (Sup. Ct. Bronx Co. 1988); *People v. Piermont*, 143 Misc.2d 839, 842-44, 542 N.Y.S.2d 115, 117-18 (Westchester Co. Ct. 1989).

without asking them any *voir dire* questions about the impact of the notice on their individual fitness to serve. (J.A. 35-37).

In a recent case from Garland, Texas, the defendants, members of a group advocating white supremacy and anti-Semitism, were convicted of conspiracy to violate the civil rights of African-American, Hispanic, and Jewish citizens. The defendants unsuccessfully contended that "they were denied the right to a fair and impartial jury" by the trial court's refusal to require the Jewish prospective jurors to so identify themselves, and thus to facilitate the defendant's use of peremptory challenges against all prospective jurors who were Jewish. The Fifth Circuit Court of Appeals held that peremptory challenge limitations based on race "apply logically to the defendants in this case." *United States v. Greer*, 939 F.2d 1076, 1086, *reh'g en banc granted*, 1991 US App LEXIS 28441 (5th Cir. 1991).[2]

Treating the defense and the prosecution identically during jury selection does not cause unbalanced juries; it produces fair and impartial ones. As six state courts have recognized, the prohibition of race discrimination in jury selection must be extended to defense counsel to guarantee that potential jurors are neither excluded nor stigmatized in violation of their constitutional rights, and to preserve the impartiality, representativeness, and appearance of fairness in the criminal justice system.

Prior to this Court's decision in *Batson*, California, Massachusetts, and Florida recognized that the use of racially discriminatory peremptory challenges in criminal cases was forbidden to the defense, as well as to the prosecution. These states explicitly held that their State Constitutions forbade peremptory challenges by defendants for racial reasons.

The California Supreme Court, in *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978), held that: "[T]he People no less than individual defendants are

2 The court also rejected the defendants' claim that they were entitled to challenge for cause every prospective juror who was African-American, Hispanic, or Jewish.

entitled to a trial by an impartial jury drawn from a representative cross-section of the community." 22 Cal.3d at 283 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n.29. The court stated that a contrary holding would frustrate other essential public policy functions:

> [W]hen a white defendant is charged with a crime against a black victim, the black community as a whole has a legitimate interest in participating in the trial proceedings; that interest will be defeated if the prosecutor does not have the power to thwart any defense attempt to strike all blacks from the jury on the ground of group bias alone.

Id.

In *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), the Massachusetts Supreme Judicial Court reasoned that the Commonwealth had the right to try its case before "the tribunal which the Constitution regards as most likely to produce a fair result" and is, therefore, deemed "equally to be entitled to a representative jury, unimpaired by improper exercise of peremptory challenges by the defense." 377 Mass. at 489 n.35, 387 N.E.2d at 517 n.35.

In Florida, the State Supreme Court restricted the racial use of peremptory challenges by criminal defendants after two controversial trials involving white police officers accused of killing African-American citizens. In each case, the defense use of peremptory challenges against African-Americans produced an all white jury; the defendants were acquitted; and the acquittals sparked public outrage, and, in one case, riots. *See* Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 195-96 (1989). The court then ruled that defense counsel were not permitted to use peremptory challenges in a discriminatory way. *State v. Neil*, 457 So.2d 481 (Fla. 1984).

Since *Batson*, three more states, including New York, have held that neither the prosecution nor the defense may exercise peremptory challenges systematically to exclude members of a racial or ethnic group from service on a criminal petit jury.

In New Jersey, a superior court ruled that *Batson* applies to the defense as well as the prosecution:

> If the courts allow jurors to be excluded because of group bias, be it at the hands of the State or the defense, they would be willing participants in a scheme that could only undermine the very foundation of our system of justice—our citizens' confidence in it.

State v. Alvarado, 221 N.J. Super. 324, 328, 534 A.2d 440, 442 (Law Div. 1987).[3] *See also State v. Levinson*, 71 Haw. 492, 795 P.2d 845, 849 (1990).

The peremptory challenge has long acted as a basis for preserving the image and reality of fairness in jury selection. These courts have all properly recognized that a peremptory challenge which permits racial discrimination, regardless of which party uses it, harms not only the challenged jurors themselves, but the entire community.

POINT II

THE CONSTITUTION PROHIBITS CRIMINAL DEFENDANTS FROM EXCLUDING PROSPECTIVE JURORS FROM SERVICE ON THE BASIS OF RACE.

Public support for the criminal justice system has always depended not only on the system's ability to render justice,

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3 *Alvarado* was approvingly cited by the New Jersey Supreme Court in *State v. Watkins*, 114 N.J. 259, 553 A.2d 1344 (1989). In that case, in *dicta*, the court stated, "It may be that discrimination in the courtroom cannot be eradicated without incurring costs. If the cost is some constraint on counsel's otherwise unbridled freedom in selecting jurors, we believe that it is a price worth paying. The alternative, that counsel could exclude a potential juror merely because the juror is a member of a cognizable group, is unthinkable. A courthouse has no room for invidious discrimination." 114 N.J. at 267, 553 A.2d at 1348.

but also on its ability to project to the parties and to the public an unimpeachable image of fairness. In cases such as those discussed above, and, regrettably, in scores of other cases where the victim is of one race and the defendant is of another, racial tension often exists inside and outside the courtroom. The Howard Beach incident was but one of the recent, highly-publicized trials in the New York City area which raised issues of racial prejudice. Within the past two years, a group of young African-American men was convicted of beating and raping a white woman who was jogging in Central Park (*see* Sullivan, *Last Sentencing in Jogger Attack*, N.Y. Times, March 14, 1991, at B4, col. 1) and a young white man was convicted of shooting and killing a young African-American man in the Bensonhurst section of Brooklyn. *See* Glaberson, *Bensonhurst Case Ends, Satisfying Few*, N.Y. Times, March 14, 1991, at A1, col. 2.

The most critical and contentious issues affecting society as a whole increasingly seem to crystallize in the course of criminal trials, placing a burden on the justice system to be fair which far transcends the facts of any particular case. Even trials in which race is not an obvious factor may raise important questions about public safety, police-community relations, and the ability of the legal system to be color-blind.

The ability to project the image of fairness in the criminal justice system rests significantly with the jurors. It is the jurors who are asked to determine the guilt of a defendant. If jurors are selected in an unbiased and impartial manner, a fair trial is more likely and public confidence in the criminal justice system is maintained. If jurors are not selected in an unbiased and impartial manner, there can be no fair trial and public confidence in the criminal justice system is ravaged.

This Court has the responsibility and authority to ensure that equal justice is secured to all. This Court, therefore, should now follow those state and federal courts that have applied the *Batson* rule to criminal defendants and their attorneys. The actions of criminal defense attorneys, no less than the actions of prosecutors and civil counsel, constitute

state action, and prosecutors have standing to uphold the Equal Protection rights of excluded jurors. Finally, a criminal defendant's rights to a fair trial and the assistance of counsel cannot and do not include the subsidiary right to discriminate against prospective jurors on the basis of race or ethnicity.

A. A Criminal Defendant's Exercise of Peremptory Challenges Constitutes State Action.

In an unbroken line of cases, this Court has held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids any action attributable to the State which deprives persons of their right to participate as jurors by reason of their race. *See*, *e.g.*, *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991) (discrimination by private litigants in civil cases); *Batson*, 476 U.S. 79 (discrimination through prosecutor's peremptory challenges); *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970) (discrimination by jury commission in summoning jurors); *Ex parte Virginia*, 100 U.S. 339 (1880) (discrimination by trial judge); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (discriminatory statute). Each case represents another step in this Court's determined effort to remove all vestiges of racism from the selection of jurors.

Although the constitutional guarantee of equal protection does not apply to the actions of private entities, *National Collegiate Athletic Assn. v. Tarkanian*, 488 U.S. 179, 191 (1988), nevertheless "governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints." *Edmonson*, 111 S.Ct. at 2082; *see also Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Having held that prosecutors may not, consistent with the Fourteenth Amendment, exercise peremptory challenges solely on the basis of race, this Court should now extend its

holding to criminal defendants and their attorneys. There is simply nothing private about the selection of jurors or the use of peremptory challenges. These challenges are exercised not in private matters but during the course of a public trial in a public building; they are not constitutionally required but are merely a privilege extended to criminal defendants by statute or decisional law; they are afforded to criminal defendants not merely for their benefit but also to assist the state in fulfilling its inherent obligation to criminal defendants and the public to provide impartial juries; the victims of race-based peremptory challenges are exposed to this discrimination only because they have been compelled by the State to appear for jury service; and, finally, peremptory challenges are not self-executing but require judicial enforcement. Accordingly, the exercise of race-based peremptory challenges by criminal defendants and their attorneys must be considered state action violative of the Equal Protection Clause of the Fourteenth Amendment.

Whether private discrimination violates the Fourteenth Amendment can be resolved only by determining whether "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). In *Lugar*, this Court set forth a two-prong test for state action: "[f]irst, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State . . . ; [s]econd, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* at 937. A state action question can be resolved "[o]nly by sifting facts and weighing circumstances" so that the nature and extent of state involvement in the private conduct can be "attributed its true significance." *Id.* at 939, *quoting Burton v. Wilmington Parking Auth.*, 365 U.S. at 722.

In *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991), this Court, basing its decision on the two-part *Lugar*

framework, held that when private litigants in a civil lawsuit exercise peremptory challenges, their conduct is state action subject to the strictures of the Equal Protection Clause.

First, this Court concluded, peremptory challenges have their source in state authority. *Edmonson*, 111 S.Ct. at 2083. Unlike events which can occur independently of the State, peremptory challenges are available only because the State has provided for them. This Court has repeatedly said that peremptory challenges are not constitutionally required. *See, e.g., Gray v. Mississippi*, 481 U.S. 648, 663 (1987); *Batson*, 476 U.S. at 107 (Marshall, J., concurring); *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948). Indeed, the State could choose to forego them entirely. Thus, the use of peremptory challenges could not occur but for the fact that the State has created them.

Turning to the second prong of the *Lugar* test, this Court concluded that "a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges," (*Edmonson*, 111 S.Ct. at 2083) inasmuch as the litigant relies to a significant extent on governmental assistance and benefits, performs a traditional governmental function, and causes an injury to the excluded juror that is aggravated by the incidents of governmental authority. *Id.* at 2083-87.

As this Court recognized, the State not only provides the means for discrimination in jury selection, but also, public officials are themselves involved in the discriminatory process from beginning to end. Potential jurors are exposed to the possibility of discriminatory challenges because the State, with its full coercive power, summons them for jury service. Additionally, race-based challenges are used exclusively on state property, *i.e.*, in state courtrooms, during the course of a criminal trial, an official activity which itself constitutes state action. *See Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) ("a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment"). As stated in *Edmonson*:

> [A] private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror . . . . By enforcing a discriminatory peremptory challenge, the court "has not only made itself party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." In so doing, the government has "create[d] the legal framework governing the [challenged] conduct," and in a significant way has involved itself with invidious discrimination.

111 S.Ct. at 2084-85 (citations omitted).

Moreover, "[t]he peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor." *Id.* at 2085. Notwithstanding a criminal defendant's participation in the process, the Constitution imposes on the State alone the duty to provide petit juries for serious crimes. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968). Additionally, the Constitution imposes on the State alone the duty to provide impartial juries drawn from a fair cross-section of the community. *See, e.g., Taylor v. Louisiana*, 419 U.S. 522 (1975).

These constitutional obligations rest with the State not merely for the benefit of criminal defendants, but also to safeguard the State's interest in prosecutions "tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36 (1965); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984) ("process of juror selection is . . . a matter of importance, not simply to the adversaries but to the criminal justice system"). The State may not abandon its obligation to criminal defendants and the public alike to provide impartial juries. States may, of course, fashion different models for achieving this goal, *Hayes v. Missouri*, 120 U.S.

68, 70 (1887), as, for example, by permitting the participation of the parties through peremptory challenges, but ultimately, the government retains the inherent obligation to provide impartial juries. *Id.* Thus, when criminal defendants and their attorneys participate in the selection of a jury, they are performing an inherently governmental function and are, therefore, bound by the same constitutional constraints by which all state actors must abide.

Finally, as this Court recognized in *Edmonson*:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courtroom itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. . . . To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

111 S.Ct. at 2087.

For the same reasons as set forth in *Edmonson*, a criminal defendant's exercise of peremptory challenges must be considered state action. To the same extent as in a civil trial, a criminal defendant's peremptory challenges depend upon statutes or decisional law and have no significance outside the courtroom; require for their effect the processes and formal authority of the court; result in the creation of a quintessential governmental body; and, if exercised in a discriminatory manner, result in an injury exacerbated by its occurrence within an official forum. No less than in the civil context, racial bias in the criminal trial, whether the product of prosecutorial or defense activity, "mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Id.*

Polk County v. Dodson, 454 U.S. 312 (1981), does not suggest a contrary result. In that case, a criminal defendant sought to sue his attorney for damages in connection with her

handling of the criminal defendant's appeal.[4] This Court ordered that the complaint against the attorney be dismissed because she had not acted under color of state law for the purposes of suit under 42 U.S.C. § 1983.[5] This Court emphasized that in her handling of the appeal, the attorney had not "exercis[ed] power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.* at 317-18, *quoting United States v. Classic*, 313 U.S. 299, 326 (1941). Rather, in prosecuting the defendant's appeal, the attorney stood in an adversarial relationship to the government. *Id.* at 322 n.13.

Significantly, however, this Court made clear in *Dodson* that a public defender may act under color of law for *some* purposes, *id.* at 324-25, and, moreover, has long recognized that state action determinations must be made only upon a close analysis of all relevant facts and circumstances. *Burton v. Wilmington Parking Auth.*, 365 U.S. at 722. Thus, a determination that a party is not a state actor in one context is not decisive on whether that party is a state actor in another context. Although a criminal defendant and his or her attorney of course stand in an adversarial relationship to the state in the endeavor to bring to light the circumstances of the crime and the identity of the criminal, the same is not the case in the selection of the jury. As stated in *Edmonson*:

> In the jury selection process, the government and private litigants work for the same end . . . . The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking

4 After determining that the defendant's claims on appeal would be frivolous, the attorney moved for permission to withdraw as counsel and for dismissal of the appeal, pursuant to a state rule of appellate procedure.

5 The "under color of state law" requirement for actions under § 1983 is identical to the "state action" requirement for other Fourteenth Amendment claims. *See Lugar*, 457 U.S. at 929.

> constitutional protections against discrimination by reason of race.

111 S.Ct. at 2086.

Moreover, unlike the public defender in *Dodson*, whose decisions concerning the handling of her client's appeal entailed no governmental involvement whatsoever, a defense attorney making peremptory challenges cannot accomplish his or her ends without the participation of the trial judge—who indisputably is a state actor. Peremptory challenges simply have no effect until courts enforce them and exclude the challenged jurors.[6] Thus, the joint activity of the defense attorney and the trial judge brings the attorney's conduct within the strictures of the Fourteenth Amendment. *Compare Lugar*, 457 U.S. at 941-42, *with Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) (private entity acting pursuant to state statute is not, without more, a state actor); *see also Shelley v. Kraemer*, 334 U.S. 1 (state courts cannot, consistent with the Fourteenth Amendment, enforce private acts of race discrimination); *Barrows v. Jackson*, 346 U.S. 249 (1953) (precluding state courts from awarding damages against property owners for violating racially restrictive covenants).

Whether in a civil case involving private litigants only, or in a criminal case pitting a defendant against the State, jury selection remains a state function and those to whom it is delegated engage in state action. Criminal defendants, no less than civil litigants, require the participation and assistance of the court to enforce their challenges and can expose potential jurors to the humiliation of discrimination only as a result of the jurors' having been summoned by the State.

Accordingly, this Court's decision in *Edmonson* dictates the conclusion that the exercise of peremptory challenges by

6 For example, N.Y. Crim. Pro. Law § 270.25(1) defines "peremptory challenge" and describes what action is necessary to effectuate the challenge. It provides: "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, *the court* must exclude the person challenged from service." (emphasis supplied).

criminal defendants and their attorneys represents state action.

B. Prosecutors Have Standing to Assert the Equal Protection Rights of Excluded Jurors.

In a long line of cases, this Court has recognized a litigant's standing to assert the rights of third parties when three conditions are satisfied: a) injury-in-fact to the litigant; b) a close nexus between the litigant and the third parties whose constitutional rights are at stake; and c) serious obstacles to the assertion of the right by the third parties themselves. *See, e.g., Craig v. Boren*, 429 U.S. 190, 192-97 (1976) (beer sellers have standing to invoke their young male customers' equal protection rights to buy beer at the same age as women); *Singleton v. Wulff*, 428 U.S. 106, 111-18 (1976) (physicians have standing to assert the rights of their patients to abortion); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (private schools have standing to assert the rights of parents and students to choose private school education).

In *Powers v. Ohio*, 111 S.Ct. 1364 (1991), this Court held that a criminal defendant has standing to assert the Equal Protection rights of jurors excluded from service on account of their race. The defendant's injury was said to arise from the doubts cast on the integrity of the judicial process by racial discrimination:

> The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. . . . If the defendant has no right to object to the prosecutor's improper exclusion of jurors, . . . there arise legitimate doubts that the jury has been chosen by proper means. The composition of the trier of fact is called into question, and the irregularity may pervade all the proceedings that follow.

Id. at 1371-72. Moreover, this Court found that the "congruence of interests" between the criminal defendant and the excluded juror made it appropriate for the defendant to raise

the rights of the juror, *id.* at 1372; and that the barriers to a suit by an excluded juror were sufficiently daunting that "a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights." *Id.* at 1373.[7] The prosecutor's standing to assert the Equal Protection rights of excluded jurors is no less apparent.

First, the prosecutor is injured in the performance of his or her professional and statutory obligations. The public prosecutor has an undeniable interest in conducting orderly, fair, and lawful criminal trials that command community confidence.[8] That interest is seriously impaired when juries are selected on the basis of race. Unconstitutional discrimination in jury selection may well impair the ability of a jury to engage in impartial fact finding. *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972). In addition, it undermines public confidence in the fairness of the criminal justice system, *see Batson*, 476 U.S. at 87, and impairs the prosecutor's ability to investigate and prosecute crimes and to obtain the cooperation of victims and witnesses. Indeed, excluded jurors may well believe the prosecutor is responsible for discrimination in jury selection, no matter who is in fact responsible, and may hold the prosecutor responsible for correcting the situation. Thus, the prosecutor clearly suffers injury-in-fact.

Moreover, the nexus between the prosecutor and the excluded juror is sufficiently close to assure vigorous advocacy of the juror's rights. The public prosecutor has an official duty to ensure that jury selection proceeds in a constitutional manner. That interest is virtually identical to

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7 In *Edmonson*, this Court, relying on *Powers*, held that private litigants in civil cases likewise have standing to assert the Equal Protection rights of excluded jurors. 111 S.Ct. at 2087-88.

8 In *Berger v. United States*, 295 U.S. 78, 88 (1935), this Court described the prosecutor as "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is . . . that justice shall be done."

the interest of the excluded juror in avoiding unconstitutional exclusion from jury service.

Finally, as recognized in *Powers*, the victims of discrimination are ill-suited to vindicate their own rights. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their selection or exclusion. Excluded jurors usually are ill-situated even to know, much less to allege and prove, which party to the criminal action was responsible for their exclusion and why. Their Equal Protection rights, therefore, can best be vindicated only if the prosecutor is permitted to challenge what appears to be discrimination in the defendant's exercise of peremptory challenges while that discrimination is occurring.

Accordingly, this Court should hold that prosecutors, no less than criminal defendants, have standing to assert the Equal Protection rights of excluded jurors.

C. The Rights to a Fair Trial and the Assistance of Counsel Do Not Include the Right to Discriminate Against Prospective Jurors on the Basis of Race.

In addition to urging rejection of these now-settled principles of state action and third-party standing, some criminal defendants have asserted a special right or privilege—apparently rooted in their Sixth Amendment rights to a jury trial and the assistance of counsel—to exercise peremptory challenges on the basis of race. No such right exists.

Any claim that the Sixth Amendment grants defendants the privilege to discriminate must fail. As this Court has repeatedly stated, there is simply no place for racism in the courtroom. "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (citation omitted). This is true especially regarding the selection of jurors. "Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Batson*, 476 U.S. at 85.

Reliance on racial stereotypes and other purposeful discrimination in the selection of jurors is intolerable not only because it violates the constitutional rights of defendants; such discrimination also violates the rights of the prospective jurors themselves. *Powers*, 111 S.Ct. at 1370; *Edmonson*, 111 S.Ct. at 2087; *Carter*, 396 U.S. at 329. Moreover, this Court has recognized that our society pays an enormous price when the legal system tolerates racial bias. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a . . . jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 555-556 (1979). *See also Peters v. Kiff*, 407 U.S. at 502.

Preventing this harm may be even more important in those cases like Howard Beach and the Miami police shooting cases described above, wherein "race is implicated in the trial" and public confidence in the fairness of the process is critical. *Powers*, 111 S.Ct. at 1371. The benefits from eliminating all racism in the selection of jurors in every case extend well beyond the courtroom. "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99.

Thus, defendants face a heavy burden in justifying their use of race-based peremptory challenges—the sole remaining instance of officially-sanctioned racism in the selection of jurors. That burden cannot be met.

First, this Court has repeatedly upheld limits on the Sixth Amendment rights of defendants, and on the actions of their attorneys to advance those rights, when other important interests were implicated. Just last term, a majority of this Court agreed that "a State may regulate speech by lawyers representing clients in pending cases more readily than it may regulate the press." *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2748 (1991) (O'Connor, J., concurring). "Law-

yers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of the system in regulating their speech *as well as their conduct*." *Id.* at 2744 (emphasis added). A prime concern in *Gentile* was the likelihood that a defense attorney's extrajudicial statements would implicate "the state's interest in fair trials." *Id.* at 2745.

The need to maintain the integrity and fairness of the process, which is a key reason for the ban on discrimination in jury selection, has served to limit defendants' Sixth Amendment rights in other contexts as well. In *Wheat v. United States*, 108 S.Ct. 1692, 1697 (1988), the Court affirmed the trial court's refusal to accept the defendant's waiver of the right to conflict-free counsel, because "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *See also*, *Nix v. Whiteside*, 475 U.S. 158, 173 (1986) (Sixth Amendment right to counsel "includes no right to have a lawyer who will cooperate with planned perjury."); *Press-Enterprise Co.*, 464 U.S. at 510 (First Amendment right of access to criminal proceedings limits defendants' ability to waive Sixth Amendment guarantee of public trial); *Faretta v. California*, 422 U.S. 806 (1975) (Sixth Amendment right to counsel does not include unfettered right to proceed *pro se*).

Likewise, the Court in *Singer v. United States*, 380 U.S. at 36, upheld the prosecution's objection to a defendant's waiver of the Sixth Amendment right to a jury trial, in part because "the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." In *Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988), the Court reiterated that defendants had no absolute Sixth Amendment right to present evidence. Instead, the justice system could demand compliance with reasonable procedural and discovery rules designed to serve the "State's interest in the orderly conduct of a criminal trial." *Id.* at 653. "More is at stake

than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself." *Id.* at 656.

The paramount public interest in preventing racism in the criminal justice system is certainly as compelling and, therefore, must take precedence over a defendant's claim to be entitled to use racially-biased peremptory challenges in selecting a jury. The Sixth Amendment gives defendants no excuse to practice racism in the courtroom.[9]

Nor does the attorney-client relationship, as delineated in the Model Code of Professional Responsibility, Canon 7 (1980), confer upon criminal defendants the right to discriminate.[10] As stated by the Supreme Court of Hawaii:

> Defense counsel, of course, has a duty to represent his client zealously within the bounds of the law, but that duty to the client, is the same as to the adversary system of justice. Thus EC 7-19 states: "The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."

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9 *Holland v. Illinois*, 493 U.S. 474, 110 S. Ct. 803 (1990), which explained that discriminatory peremptory challenges were prohibited by the Fourteenth Amendment rather than the Sixth Amendment, furnishes no support for the view that the Sixth Amendment grants defendants a *right* to discriminate. The majority in *Holland* reiterated that "race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage." 110 S.Ct. at 807; *see also* 110 S.Ct. at 811 (Kennedy, J., concurring):

> I write this separate concurrence to note that our disposition of the Sixth Amendment claim does not alter what I think to be the established rule, which is that the exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights.

See also 110 S.Ct. at 828 (Stevens, J., dissenting) (any interest in racially-based peremptory challenges "rests on the assumption that a black juror may be presumed to be partial simply because he is black—an assumption that is impermissible since *Batson*.").

10 *See also* Model Rules of Professional Conduct, Rule 3.1 (1983).

> Unfortunately, there has grown up an impression, among some defense lawyers, that the mandate to represent a client zealously overrides the qualification "within the bounds of the law."
>
> . . .
>
> Here, respondent['s] counsel was . . . attempting [by excluding all women] to obtain what he hoped would be a partial, rather than an impartial jury. This is not zealous representation within the bounds of the law. It is the contrary.

State v. Levinson, 795 P.2d at 848-49.

In addition, the attorney-client privilege would not be violated by requiring criminal defendants or their attorneys to state the reasons for their challenges, when a *prima facie* case of discrimination is established. *Batson*, 476 U.S. at 96. The attorney-client privilege shields from disclosure communications between attorneys and their clients, and nothing else. It does not bar courts from requiring defendants and their attorneys to set forth facts or reasons in support of their requests for relief, even if those facts or reasons have previously been the subject of attorney-client communications. *See Upjohn v. United States*, 449 U.S. 383, 395-96 (1981); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir. 1984). This requirement is hardly confined to jury selection and has never been thought to constitute an unwarranted invasion of the attorney-client privilege or to compromise the defendant's trial strategy. *See, e.g., Williams v. Florida*, 399 U.S. 78 (1970) (upholding notice-of-alibi statute). Indeed, criminal defendants or their attorneys must already set forth facts or reasons in support of their requests for cause challenges.

Second, the unequivocal constitutional prohibition against discrimination in jury selection surely takes precedence over the only right that is directly implicated by *Batson*: the statutory right to exercise peremptory challenges. *Gray v. Mississippi*, 481 U.S. at 663. This Court has repeatedly held that

defendants have no constitutional right to peremptory challenges:

> The right [of peremptory challenge] is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guarantees of "an impartial jury" and a fair trial.

Frazier, 335 U.S. at 505 n.11, *quoting Stilson v. United States*, 250 U.S. 583, 586 (1919); *see also Swain v. Alabama*, 380 U.S. 202, 219 (1965).[11]

While there is a "long and widely held belief that the peremptory challenge is a necessary part of trial by jury" (*Swain*, 380 U.S. at 219), the Court has permitted numerous restrictions on defendants' exercise of such challenges. *See Swain*, 380 U.S. at 243-44 (Goldberg, J., dissenting). "Indeed, the concept of a peremptory challenge as a totally free-wheeling right unconstrained by any procedural requirements is difficult to imagine." *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 2279 (1988). One such requirement that can and should restrict the peremptory challenge is the command of the Equal Protection Clause that there be no racial discrimination in jury selection.

As this Court has recently explained, peremptory challenges "are a means to achieve the end of an impartial jury." *Id.* at 2278. So long as the jurors who sit are impartial, the fact that the defendant could not use peremptory challenges as he or she wished "does not mean that the Sixth Amendment was violated." *Id.*; *see also Lockhart v. McCree*, 476 U.S. 162, 184 (1986); *McDonough Power Equipment, Inc. v.*

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11 In fact, the number of challenges varies widely by jurisdiction. *See* Hoeffner, *Defendant's Discriminatory Use of the Peremptory Challenge after Batson v. Kentucky*, 11 Crim. L. Rev. 349, 350 n.3 (1989). "In this country, the power of the legislature of a state to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury . . . . The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more." *Hayes*, 120 U.S. at 71.

Greenwood, 464 U.S. 548 (1984); *Smith v. Phillips*, 455 U.S. 209 (1982); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors").

Third, because a "person's race simply 'is unrelated to his fitness as a juror' " (*Batson*, 476 U.S. at 87) (citation omitted), preventing defendants from relying on the irrelevant and intolerable factor of race does not interfere in the least with their ability to select fair jurors. Jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race." *Cassell v. Texas*, 339 U.S. 282, 286 (1950).

Thus, "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury." *Swain*, 380 U.S. at 208; *see also Taylor v. Louisiana*, 419 U.S. at 538; *United States v. Hatchett*, 918 F.2d 631, 637 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 2839 (1991). Nor is a defendant entitled to use racial bias as a means of obtaining "a jury believed by defense counsel as likely to view the evidence in a particular way." *United States v. Devin*, 918 F.2d 280, 291 (1st Cir. 1990). Defendants can no more accomplish these prohibited ends by *excluding* qualified jurors for racial reasons, then by insisting on the *inclusion* of unqualified jurors of a particular race. The Constitution requires impartiality, not favoritism. It is to be remembered that such impartiality "requires, not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Hayes*, 120 U.S. at 70, *cited in Batson*, 476 U.S. at 107 (Marshall, J., concurring).

Finally, *Batson* imposes critical, but hardly extensive or unwieldy, limits on the exercise of peremptory challenges. "[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a

test." *Edmonson*, 111 S.Ct. at 2088.[12] Defendants will still be able to use *voir dire*, cause challenges, and unbiased peremptories in order to obtain an impartial jury. *See Allen v. Hardy*, 478 U.S. 255 (1986). "Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all." *Hernandez v. New York*, 111 S.Ct. 1859, 1874 (1991) (O'Connor & Scalia, JJ., concurring). Defendants will only be prevented from relying on the biased stereotypes and racist assumptions that this Court has rightly condemned.

The experience in New York and other jurisdictions confirms this Court's prediction that these limits on the peremptory challenge will not "create serious administrative difficulties." *Batson*, 476 U.S. at 99. "Fears of increased costs and prolonged trials also appear exaggerated, especially since the minimal increases associated with the limitation's implementation are . . . a small price to pay for the elimination of a too tempting opportunity for discrimination that has been too long tolerated in our courts of law." Hoeffner, *supra*, at 368.

CONCLUSION

In *Batson*, this Court rejected the claim that the "unfettered exercise of the [peremptory] challenge is of vital importance to the criminal justice system." 476 U.S. at 98. The Court made it clear that the Equal Protection Clause guarantee against discrimination on the basis of race "would be

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12 Some experts cling to the view, despite its repeated rejection by this Court, that race alone should matter. *See e.g.*, Goldwasser, *Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 Harv. L. Rev. 808, 838 (1989). However, "[s]ocial scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. F.C.C.*, 110 S.Ct. 2997, 3029 (1990) (O'Connor, Kennedy & Scalia, JJ., dissenting).

meaningless were we to approve the exclusion of jurors on the basis of such assumptions [about their fitness to serve], which arise solely from the juror's race." *Id.* at 97-98. Since then, this Court has held that racially-biased peremptory challenges are just as offensive, and unconstitutional, when exercised by the parties in a civil trial (*Edmonson*) or by the prosecution in any trial, regardless of the defendant's race (*Powers*). Discriminatory jury challenges are no more necessary or legitimate when used by a criminal defendant; the constitutional prohibition against racial discrimination in jury selection does not confront an invisible barrier around the defense table in a public courtroom, leaving the defendant free to invoke the assistance of the law and the judge to strike jurors on the basis of race. Prohibiting defense counsel from excluding prospective jurors on the basis of race will eradicate the last vestige of racial discrimination in the selection of jurors.

More than fifty years ago, Justice Black wrote that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940). No one seeking to practice racial discrimination should be permitted to enlist the justice system in that war.

Respectfully submitted,

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No. 91-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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STATE OF GEORGIA,
Petitioner,

-against-

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

AMICUS CURIAE BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the United States Constitution prohibits a criminal defendant from exercising peremptory challenges based upon race.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation whose membership is comprised of more than 5,000 lawyers and 25,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors,

or judges of the state or federal courts. Members of NACDL regularly represent defendants who are tried by juries in both state and federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that this issue is of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The parties have consented to the filing of this amicus curiae brief. A consent to file has been forwarded to the Clerk of the Court.

SUMMARY OF ARGUMENT

The State of Georgia has struck preemptively against three white defendants in Albany, Georgia charged with committing simple battery and aggravated assault against two African Americans who were allegedly using their laundromat; it claims that the defendants will exercise their peremptory strikes to keep African Americans off the jury, and seeks to constrain these defendants with a rule analogous to that set forth by this Court in Batson v. Kentucky, 476 U.S. 79 (1986). This Court should reject the State's proposal for reasons that go to the fundamental nature of the defendant's Sixth Amendment right to a jury trial.

First, the criminal defendant is not a state actor but an unequal opponent of the government whose power the Constitution seeks to enhance through "rights" which tilt the balance in his or her favor. The defendant may lose liberty and even life itself. It would be simply unfair and unworkable to attribute to one defending against the government the very

statelike qualities that constrain the government in its relations with the defendant; the accused is the quintessential private party.

Second, the defendant's right to the peremptory challenge secures his or her Sixth Amendment right to a jury trial by insuring that the defendant will be tried by a group of persons whom he or she determines to be fair and in whom he or she has trust. To place any constraint on the peremptory challenge would undermine the defendant's right to a fair trial because it would force the defendant to accept a jury infected by bias which the "for cause" challenge cannot ferret out. The defendant detects this bias during an inherently subjective and interpersonal exchange in voir dire. The government cannot by definition experience such subjectivity because "it" is not a person, but a sovereign without a specific race or persona. "It" also cannot sense the fear the defendant experiences because it is not the object of accusation. The defendant's interest in protecting against bias outweighs the concerns of the

rejected juror or the community polarized along racial lines. The juror is not at risk of losing life or liberty, and will perceive the defendant's strike as the defensive gesture it is by one stripped to a position of almost total powerlessness. The community's desire to convict amounts to mob rule and should not be sanctioned by this Court.

Third, criminal defendants, who are disproportionately members of racial minorities, should be permitted to make race-conscious decisions in the exercise of their peremptories to diminish the effect of racism on their trials. Despite our efforts to achieve a system of criminal justice which is "colorblind," the system is in fact pervaded by race prejudice. As a result, a defendant who is a racial minority is correct in assuming that an all-white jury views him or her without the idealism toward which color blindness aspires. That defendant must therefore be able to invoke what is essentially a defensive right to strike those on the venire whom he or she reasonably infers would be incapable of confronting and suppressing their

racism. The right is grounded in the Equal Protection Clause itself and grows out of decisions issued by this Court over the past century culminating in Batson: the defendant's right to a jury, which can view him or her without the racial animus which for centuries has distorted our system of criminal justice.

ARGUMENT

I.

A CRIMINAL DEFENDANT IS AN INDIVIDUAL ACCUSED BY AND ENGAGED IN AN ADVERSARIAL CONTEST AGAINST THE STATE AND SHOULD NOT BE DEEMED A STATE ACTOR

The question of whether criminal defendants are constrained by the Equal Protection Clause depends on whether they can be deemed "state actors." In a case decided last Term, Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991), this Court held that a private civil litigant could raise the equal protection claim of a person whom the opposing party has excluded from jury service while exercising its

peremptory challenges. Id. It reasoned that, under the analysis set forth in Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982), "a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges," 111 S. Ct. at 2083, because the civil proceeding itself depends upon the state for its existence and functioning. Id. at 2083-87. This Court was careful, however, to limit the precise holding in Edmonson to the "ordinary context of civil litigation in which the government is not a party . . . ." Id. at 2086 (emphasis added). It did so in implicit recognition of the fact that state action analysis rests upon a close factual exegesis of the "peculiar facts or circumstances present[ed]," because the "largeness" of government creates a "multitude of relationships" between private parties and the state, only some of which can reasonably be characterized as so infused with the government's presence as to turn a private party into a "state actor." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722, 725-26 (1961).

The "peculiar" facts presented by the case at bar -- the anticipated exercise of peremptories by a criminal defendant -- place it outside the narrow reach of Edmonson. In contrast to the civil litigant, who shares with its opponent the exact same relationship to the (nonparty) state, a criminal defendant is engaged in battle against the state. A criminal trial thus introduces the power of the government as a party into the proceeding in a way that disrupts the symmetry between the parties found crucial to this Court's holding in Edmonson.

That this Court believed the symmetry important is reflected in its rejection of the Edmonson respondent's reliance upon Polk County v. Dodson, 454 U.S. 312 (1981), in which a public defender was held not to be a state actor because her relationship with the government was otherwise "adversarial." Polk County, 454 U.S. at 320 & 322 n.13. The typical civil litigant, this Court held, unlike a public defender and a fortiori a criminal defendant, does not seek to defeat the state but rather to use the judicial process (the state) to defeat its civil

(and non-state) opponent. It noted that

> [i]n the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury-selection process, the government and private litigants work for the same end. [In Dodson], a government employee was deemed a private actor because of his [or her] purpose and functions . . . .

Edmondson, 111 S. Ct. at 2086 (emphasis added). Further on, the Court restated the comparison drawn in Polk County between the role of the public defender and a state-employed physician by characterizing the civil litigant's relationship to the government as more like that of the physician in West v. Atkins, 487 U.S. 42 (1988), than the defender in Polk County. Edmonson, 111 S. Ct. at 2086.

A close look at Polk County and Atkins clarifies the difference emphasized in Edmonson. The defendant in Polk County brought an action under 42 U.S.C. § 1983 based on the claim that his attorney's successful motion to withdraw as counsel from his appeal of a conviction for robbery violated his constitutional rights. Polk County, 454 U.S. at 314-15. This

Court held that he had no civil claim because a public defender does not act "under color of state law." It reasoned that the criminal defense attorney owes the client an "undivided loyalty," particularly while "performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 325.[1] Cf. Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (although court-appointed counsel serves pursuant to state authorization and in furtherance of the constitutional requirement of the Sixth Amendment, her duty is not to the public at large as is the government's, but to her client).

In Atkins, an inmate brought a claim under 42 U.S.C. § 1983 for mistreatment by a physician who worked under contract providing medical services to the state prison-hospital. This Court permitted the claim and distinguished Polk County with the following point: "In contrast to the public defender,

[1] The only situation in which public defender might act under "color of state law" is when he or she performs "certain administrative and possibly investigative functions" such as hiring and firing employees. Id. at 324-25. See, e.g., Branti v. Finkel, 445 U.S. 507 (1980).

[the physician's] professional and ethical obligation to make independent medical judgments, did not set him in conflict with the State and other prison authorities. Indeed, his relationship with other prison authorities was cooperative." 108 S. Ct. at 2256 (emphasis added). The defense lawyer's distinctively "adversarial role" in the criminal justice system was, according to the Atkins Court, the decisive factor in Polk County which distinguished the public defender from those public employees who perform their duties "under color of state law." Id.

Criminal defense attorneys -- even those paid by the government -- should not be burdened with responsibilities to any party other than the accused while fulfilling their constitutional "purpose and function" of battling the government. Several amicus curiae attempt to distinguish Polk County with the proposition that the task of exercising peremptory challenges is different in kind from the myriad of

other functions performed by defense counsel.[2] The Solicitor General, for example, argues that "tactical decisions such as determining what defenses to raise, what questions to ask on cross-examination, what objections to make to the prosecutor's evidence, whether the defendant should testify, and what witnesses to call, if any" are "fundamentally private ones," whereas the exercise of the peremptory by the defense is "governmental" in character because the government itself "gives the defendant the right to participate in the selection of the body that will evaluate both parties' evidence." Brief for the United States As Amicus Curiae Supporting Petitioner at 17-18. This distinction cannot be controlling.

The decision to strike a particular juror is nothing if not tactical; the accused may instruct counsel to make the challenge out of an intuitive sense that the prospective juror will be not

[2] The following amicus curiae supporting petitioner discuss Polk County: Brief for the United States at 17-19; Brief of the Criminal Justice Legal Foundation at 20-23; Brief for Charles J. Hynes, District Attorney, Kings County, New York [hereinafter "Charles Hynes"] at 15-17.

fair. Conversely, the fact that the government "gives" the defendant a particular right does not imbue that right with sufficient public character to transform its exercise into state action, as the enumeration of any number of rights, all of which the Solicitor General concedes are "private," demonstrates. The government, for example, not only grants the defendant the Sixth Amendment right to subpoena witnesses on his or her behalf, but also provides a specific mechanism for its enforcement in federal court in Federal Rule of Criminal Procedure 17 and particularly Rules 17(a) and (d).[3] As the rule makes plain, the government, in the persons of a United States judge and clerk, effect the process of calling witnesses

[3] Rule 17(a) and (d) provide in relevant part (emphasis added):

> (a) A subpoena shall be issued by the clerk under the seal of court. . . . It shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed . . .
>
> (d) A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age.

and allow for the participation of a United States marshal. This state involvement in a criminal defense attorney's tactical decision to call witnesses for the defense is as powerful as the trial court's sanctioning of a peremptory strike, but it clearly does not transform the attorney into a state actor. He or she remains a private party whose resources, by comparison with the government adversary, are deemed unequal.

In Polk County itself, this Court listed as typical representational functions immune from review under section 1983, the entering of "not guilty" pleas, moving to suppress evidence, objecting to government evidence at trial, cross-examining government witnesses and making closing arguments on the client's behalf. Polk County, 454 U.S. at 320. All such functions are "statelike" in the sense argued by the New York Kings County District Attorney, Charles Hynes, because all, and particularly such tasks as getting evidence illegally obtained suppressed, cannot be accomplished without the "joint activity of the defense attorney and the trial judge." Amicus

Curiae Brief of Charles Hynes at 17. The decision to characterize a criminal defense attorney's exercise of peremptory challenges as state action should not turn on the making of false distinctions between plainly representational activities. Rather, the decision should turn on whether, in all fairness, the defendant should ever be deemed a state actor. Lugar, 457 U.S. at 937.

To appreciate why a defendant should not be deemed a state actor, it is necessary to deconstruct the meaning of the term "state." The "state" in Edmonson was comprised of Congress, which had enacted the statutes setting forth qualifications for jury service and procedures by which jurors were to be selected, summoned, assigned, excused, paid, and punished, 111 S. Ct. at 2084; and the trial judge, who exercised some control over voir dire and who ministered to the act of excusing the struck jurors. Id. In a criminal trial, by contrast, the "state" includes not only legislative and judicial actors, but also the Executive Branch itself, the

function of which is to enforce the laws against private citizens through deployment of its prosecutorial power. The introduction of this very potent state actor into the process disrupts the equipoise between the parties found controlling in Edmonson. Unlike civil litigants, who are similarly situated with respect to the state (the judge and Congress), a criminal defendant is drawn into intense conflict with the state (the prosecutor) in a struggle over the basic constitutional right of liberty. When this Court's majority in Edmonson noted that the "government and private litigants work for the same end," id. at 2086, it did not mean that private litigants work for the exact same end with respect to each other, id. at 2094-95 (O'Connor, J., dissenting), but rather that they each share the same type of relationship with the entity which has established the machinery for combat.

The criminal battlefield, however, is not drawn with such symmetrical boundaries. In fact, the proceeding is asymmetrical by constitutional definition because the

"possession" which the defendant stands to lose is not property, but liberty, and even life. The parties in a criminal trial have different roles, rights, and responsibilities. The defendant's posture is a protected one, and within certain limitations, he or she litigates by "less cumbersome" rules.

The accused, for example, enjoys a number of trial-related rights, including the presumption of innocence, the Fifth Amendment privilege against self-incrimination, Fifth and Fourteenth Amendment due process rights, and Sixth Amendment rights to trial by impartial jury, to confront and cross-examine adverse witnesses, to compulsory process for obtaining favorable witness testimony, and to the assistance of counsel in mounting a defense. See U.S. Const. amends. V, VI, and XIV, § 1. The government enjoys no comparable constitutional protections. Moreover, unlike the situation in Edmonson, in which the parties were constrained by the same pretrial rules, discovery obligations in the case of a criminal trial flow predominantly in favor of the defense: the

government has an affirmative obligation to disclose evidence favorable to the defendant, Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972), whereas the defendant is entitled to refrain from serving as an investigative tool against him or herself and may conceal information helpful to the government. Perhaps the strongest evidence of the constitutional advantage afforded the defendant is the due process requirement that the government prove its case against the defendant beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); see also Williams v. Florida, 399 U.S. 78, 111 (1970) (Black, J., concurring in part and dissenting in part) ("[T]actical advantage to the defendant is inherent in the type of [criminal] trial required by our Bill of Rights.").[4] See generally Katherine Goldwasser, Limiting a

[4] As the United States Court of Appeals for the Second Circuit stated in rejecting the argument that fairness requires identical treatment of the parties in a criminal case:

> A criminal prosecution, unlike a civil trial, is in no sense a symmetrical proceeding. The prosecution assumes substantial affirmative obligations and accepts numerous restrictions, neither of which are imposed on the defendant. . . . [I]n the context of criminal investigation and criminal trials, where accuser and accused have inherently different roles, with entirely different powers and rights, equalization is not a sound principle . . . .

United States v. Turkish, 623 F.2d 769, 774-75 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); see also Dunham v. Franks Nursery & Crafts, Inc., 919 F.2d 1281, 1292 (7th Cir. 1990), cert denied, 111 S. Ct. 2797 (Ripple, J., dissenting) (discussing ways in which civil and criminal trials are "simply different").

Criminal Defendant's Use of Peremptory Challenges: On Symmetry And the Jury in A Criminal Trial 102 Harv. L. Rev. 808, 821-26 (1989); Susan Bandes, Taking Some Rights Too Seriously: The State's Right to a Fair Trial 60 S. Cal. L. Rev. 1019 (1987).

The asymmetry of the criminal process, when contrasted with the exacting symmetry of a civil proceeding, reflects the heightened constitutional concern over the liberty interests at stake and the imbalance of power which that asymmetry attempts to equalize. In a civil proceeding, a defendant (or a plaintiff initiating a cross-claim) is at risk of losing property. A defendant in a criminal trial, by contrast, is at risk of losing liberty, or even his or her life. Although

both property and liberty are interests of constitutional significance, see U.S. Const. amend. V, they are not afforded equivalent protection under the Due Process Clause.[5] For example, in Addington v. Texas, 441 U.S. 418 (1979), this Court held that the high standard of proof applicable in a criminal proceeding (beyond a reasonable doubt), when compared with the minimal standard of proof applicable in a civil contest over property (preponderance of the evidence), reflected a societal belief that safeguards were necessary to protect against deprivation of life and liberty. Id. at 423-26; see also Winship, 397 U.S. at 372 (Harlan, J., concurring) (proof beyond a reasonable doubt bottomed on fundamental value determination that "it is far worse to convict an innocent man that to let a guilty man go free."); cf. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (process due a recipient of

[5] The fact that no fewer than five constitutional amendments, see U.S. Const. amend. IV, V, VI, VIII, and XIV, § 1, are devoted to protecting the defendant against the government suggests the centrality of the values of "life" and "liberty" in the framers' vision.

governmental benefits depends upon a balancing of the private interest affected by the official action, the risk of erroneous deprivation, and the probable value, if any, of additional or substitute procedural safeguards"). Perry v. Sindermann, 408 U.S. 593 (1972) (state junior college professor was denied procedural due process when college failed to afford him a hearing before deciding not to renew his contract). The entire criminal process, in short, is designed to tilt the constitutional balance in favor of the accused because he or she has so much at stake. As the Court emphasized in Lugar, 457 U.S. at 939, and reemphasized in Edmonson, 111 S. Ct. at 2083, state action determinations are "factbound" inquiries, but under no circumstances should private action be attributed to the state unless the party can, "in all fairness" be deemed a governmental actor. Id. (emphasis added). It is difficult to imagine a party to whom it would be less fair to attribute government power than one locked into combat against his or her will with the state itself. See Goldwasser, supra at 820.

The criminal defendant needs to muster whatever resources he or she can to mount a defense against an attack on that freedom. One critical resource is the peremptory itself.

In the case which preceded Batson, 476 U.S. 79 (1986), Swain v. Alabama, 380 U.S. 202 (1965), this Court recognized the nonequivalent stature of the parties to a criminal proceeding when it set forth the demanding level of proof for making an equal protection claim against the state's discriminatory use of peremptories.[6] It held that the criminal defendant in Swain itself had failed to satisfy that standard, in part because he did not show who was responsible for removing African Americans from the county's juries. Implicit in the Court's analysis was a holding that the criminal defendant's use of peremptories did not constitute state action. It stated that

> a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the State. The ordinary exercise of challenges by defense counsel does not, of course, imply purposeful discrimination by state officials.

[6] Batson overruled the "proof" requirement of Swain because it effectively had denied defendants the ability to make a showing of discrimination during the course of a specific trial.

Id. at 227 (emphasis added). Edmonson has done nothing to change this fundamental view of the relative powers of the criminal defendant and the state adversary against which he or she is pitted. Roman v. Abrams, 608 F. Supp. 629, 633 (S.D.N.Y. 1985) (holding that defendant and defense counsel are not state actors in exercising peremptories). The combative nature of that relationship has prompted many courts and commentators alike to conclude that the criminal defendant is not at any point imbued with powers of the government. See, e.g., Goldwasser, supra at 813 n.26 (collecting cases and commentary).

This Court should insure that this position remains the law by holding that a criminal defendant does not become a "state actor" when exercising a right which secures the meaningful exercise of his or her Sixth Amendment right to a

jury trial.

II.

UNFETTERED PEREMPTORY CHALLENGES SECURE THE MEANINGFUL EXERCISE OF THE ACCUSED'S SIXTH AMENDMENT RIGHT TO A JURY TRIAL, AND SHOULD NOT BE BURDENED TO VINDICATE THE INTERESTS OF THOSE WHOSE LIBERTY AND LIFE ARE NOT AT STAKE

Placing any constraint on the defendant's exercise of the peremptory challenge would fatally undermine its utility to the defense in a way which does not similarly impair the government. In Holland v. Illinois, 493 U.S. 474, 110 S. Ct. 803 (1990), this Court held that the government's discriminatory use of peremptories does not violate the defendant's right to an impartial jury; yet the question presented here, which suggests that the defendant's exercise should be constrained, would impair the defendant's Sixth Amendment right to a jury trial by fatally undermining the defendant's ability to keep from the jury those whom the defendant senses will not be fair. In the former case, the

defendant might lose jurors whom he or she prefers, but in the latter, the defendant is forced to accept people about whom he or she harbors deep distrust. This burden would operate as an even more severe constraint than the loss of a peremptory itself;[7] it could affect an entire set of challenges, particularly in communities polarized by racial conflict, as is the case here. It could result in the forced seating of jurors whom the defendant has determined harbor racial animus.

A. The Defendant Has A Uniquely Personal Stake In The Unfettered Exercise Of The Peremptory Challenge.

The defendant's use of the peremptory gives expression to the uniquely personal and subjective nature of the interaction between the defendant and his or her potential jurors and jury. For both the government and the defense, peremptory challenges provide assurance that the resultant jury will be impartial. Swain, 380 U.S. at 219 (1965) (peremptories

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[7] See Ross v. Oklahoma, 487 U.S. 81 (1988).

"eliminate extremes of partiality on both sides"); see also Holland, 110 S. Ct. at 808 (1990) ("one could plausibly argue that the requirement of an impartial jury impliedly compels peremptory challenges") (emphasis in original); Batson, 476 U.S. at 91 (peremptories traditionally viewed as one means of assuring selection of unbiased jury). Yet peremptories have another and entirely separate function which is specific to the accused: to give effect to that individual's intuitive and inherently subjective reaction to a potential juror. Allowing the defendant to express this reaction by exercising a peremptory challenge acknowledges his or her uniquely personal stake and individual persona in the criminal process. Although the government, in the person of a specific prosecutor, may also have an intuitive dislike of a potential juror, that prosecutor's involvement in the trial is not personal but civic. He or she represents the sovereign, and as such, is responsible for vindicating the public good without bias or animus. Thus, although it is entirely appropriate and in fact

consistent with the goal of insuring a fair trial to give expression to a defendant's intuitive distrust of a potential juror, it is completely inappropriate to give effect to such feelings in a prosecutor. See Goldwasser, supra at 829-831. As Blackstone put it, "how necessary it is that a prisoner . . . should have a good opinion of his jury, the want of which might totally disconcert him." 4 W. Blackstone, Commentaries 353, quoted in Goldwasser, supra at 829.[8]

For over one hundred years, this Court has stressed the role that peremptories play in securing the defendant's trust in the legitimacy of the criminal proceeding. In Lewis v. United States, 146 U.S. 370 (1892), it reversed a conviction because the trial court required the defendant to exercise his peremptories outside of the jury's presence. The defendant's

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[8] The fact that the federal rules grant the defendant a greater number of peremptory challenges than the government reflects a legislative determination that the two parties' interest in the challenge is not identical. See Fed. R. Crim. P. 24. Many state jurisdictions, including Georgia, also grant the defendant more peremptories than the government. See Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Juries, app.D at 282-84 (1977).

peremptory, the Court emphasized, must be allowed unfettered expression so that it can serve its function of securing the accused a fair trial. Id. at 376. By depriving the defendant of the opportunity to observe and visually compare each juror while he executed his challenges, the trial court fatally undercut the usefulness of those challenges to him. Id. at 376-78. See also Pointer v. United States, 151 U.S. 396, 408 (1894) (emphasizing the need to allow the defendant unrestricted exercise of peremptory challenges).

In Batson this Court again emphasized the trust relation built between the defendant and his or her jury when it linked the government's denial of equal protection to the defendant with its denial of equal protection to the juror. Id. at 86 (equal protection guarantees defendant that State will not exclude members of his or her race from venire on account of race). The Batson standard for determining a prima facie case, in fact, placed the racial identity between the defendant and the excluded juror at its center by requiring that the defendant first

establish his or her membership in a "cognizable racial group" and that the government exercised peremptories to remove from the venire members of the defendant's race. Id. at 96. Last Term, in Powers v. Ohio, 111 S. Ct. 1364 (1991), this Court eliminated the requirement that the defendant prove his or her racial identity with the excluded juror, but emphasized in even more explicit terms than did Batson that the (ideal) relationship between the defendant and jury was premised on a "bond of trust" which developed with the defendant's involvement in picking the body ultimately chosen to decide his or her fate. Id. at 1372. This trust is the defendant's faith that the jurors will judge him or her fairly. The Court characterized their relationship as "close if not closer than" those previously recognized to convey third-party standing. Id.

The historical development of the peremptory indicates that its primary purpose was to protect defendants. Goldwasser, supra at 827-28 & n.1114-18. See also Developments in the Law: Race and the Criminal Process 101

Harv. L. Rev. 1472, 1582 & n.171 (1988) (hereinafter "Developments"). Some of its earliest advocates, including the influential legal commentator Sir William Blackstone, clearly saw it as a defendant's exclusive right, "'a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous.'" 4 W. Blackstone, Commentaries 353 (emphasis added), quoted in Jon M. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Juries 147 (1977). Hundreds of years before, in 1305, the English Parliament completely eliminated the right of the "crown" to challenge prospective jurors except for "cause certain," but continued to allow defendants thirty-five peremptory challenges. See Van Dyke, supra at 147.[9]

[9] In 1530, the Parliament reduced the number to twenty in all cases except high treason; the number in England is now set at seven. See Van Dyke, supra at 148. The crown, however, was able to evade the preclusion against its exercise of peremptories by developing the practice of "standing aside," which operated as the functional equivalent of peremptories: the prosecutor would designate a certain number of jurors to "stand aside" and would not be forced to explain its decision if the court could empanel twelve unchallenged jurors. Id.

Various colonial and state courts accepted the 1305 law as part of the received common law but resisted granting the government the peremptory right; both New York and Virginia, for example, denied the government any peremptory challenges for most of the nineteenth century. Even states which eventually allowed the government this type of strike limited their number dramatically, as the case of Delaware makes plain. In 1782, the Delaware legislature determined that the defendant should have six peremptory challenges and the government three but added the provision that for each challenge actually executed by the government, the defendant would be compensated with an extra one. Id. at 147-48.

B. The Defendant's Right To An Unfettered Peremptory Challenge Is Bound Up In, And Gives Expression To, The Sixth Amendment Right To A Jury Trial Itself.

The peremptory challenge has been treated as essential to securing the defendant's Sixth Amendment right to a fair jury trial. Swain, 380 U.S. at 218-19. When a venire of

thirty to forty persons walk into the courtroom, each member automatically turns to look at the defendant. Throughout voir dire, they look at the defendant, making facial expressions in response to questions, and using body language in reaction to answers given by others. All of these subtle movements are signs of attitudes toward the defendant which will ultimately affect the outcome of the trial. All of them are indications of likes and dislikes, biases, and beliefs which will ultimately affect how a person will view the evidence and react to the defense. A potential juror who shifts in his seat and folds his arms in response to a question about whether he has any problems with an insanity defense is communicating a feeling that the defendant is entitled to believe will negatively affect that juror's ultimate decision. Yet no strike for cause will prevail, particularly in federal court where voir dire is so limited, provided the juror states that he can be fair and impartial. Cf. Rosales-Lopez v. United States, 451 U.S. 182 (1981). And as all practicing trial attorneys know, most

prospective jurors will claim they can be fair, and may even be unconscious of the bias they feel and convey despite this representation. Nothing could so undermine a defendant's confidence and trust in a jury as to be faced with twelve people, even some of whom have demonstrated, through such subtle gestures, an antagonism that might prevent the possibility of a fair trial.

The subjective exchange described above, an exchange which characterizes jury selection, suggests how antithetical to human experience it would be to deny the defendant the unfettered right to act upon assumptions concerning a juror's view of him or her, even when those assumptions are informed by race. Unlike the government, the criminal defendant is a person of a specific race (and, inter alia, gender, class, ethnicity). His or her decision to exercise a peremptory challenge not only reflects the defendant's perception of a potential juror, but as importantly, the defendant's perception of that juror's perception of him or her, one which the

defendant may fairly presume includes assumptions about the defendant's race. In other words, race may be a part of the complex of factors giving rise to the defendant's belief that a potential juror would not be fair or sympathetic to a recognized legal defense.[10] The defendant who strikes a juror is not declaring to society that he or she believes the juror to be inferior or subordinate, or even that he or she dislikes people of that race, but rather that he or she perceives the juror to dislike him or her. See Harry Zirlin, Unrestricted Use of Peremptory Challenges by Criminal Defendants and Their Counsel: The Other Side of the One Color Jury 34 N.Y.L. Sch. L. Rev. 227, 246, 247 (1989). The strike, like the posture of the individual on trial, is entirely defensive.

The government is in an entirely different position because by definition it is a sovereign "entity" devoid of race or any specific human characteristic. It has no persona, no

[10] Jurors may be hostile, for example, to such common defenses as duress, entrapment, insanity, or consent.

body language, and gives no first impression.[11] "It" therefore cannot have a subjective interaction with a potential juror, and can only exercise a race-based challenge by making racial assumptions about the interaction between the defendant and the juror. Yet Batson clearly stands for the proposition that it is impermissible for the government to make such assumptions. The ideal world, and the standard to which the government must be held in the exercise of its peremptories, is one in which race does not work to the disadvantage of any person, including a defendant or potential juror.

The difference between the defendant and the government extends beyond the fact that the defendant is a person, and the government an entity. It also encompasses the disparity in power which this basic contrast implies. In a criminal prosecution, the defendant is a private being who

[11] One jury instruction, in fact, suggests that the jury not consider the persona of counsel for either the government of the defense. See Devitt & Blackmar, Federal Jury Practice and Instructions, §10.12 (3d ed. 1977); another instruction advises to consider only the guilt or innocence of the accused and no other person. Id. at §11.06.

lacks any real capacity to inflict harm, whereas the government assumes one of its most powerful (peacetime) roles. When the accused strikes, the potential juror is far more likely to perceive it as a defensive act committed by an individual thrust into a position of relative powerlessness; when the government strikes, by contrast, the juror can and should perceive it as an offensive move through which the sovereign communicates its belief in that juror's unfitness to serve. Cf. Stephen R. Carter, When Victims Happen To Be Black 97 Yale L.J. 420, 429-33 (1988) (distinguishing between racial consciousness and racism and arguing that the former is not the same evil as the latter). The assertion of amicus curiae Charles Hynes, district attorney, that "excluded jurors may well believe the prosecutor is responsible for discrimination in jury selection, no matter who is in fact responsible," Brief of Charles Hynes at 19, is true only if the jurors are precluded from knowing who makes the strike, and can easily be remedied with a simple rule requiring that defense and government challenges be

communicated to the panel as distinct.[12]

C. The Defendant's Sixth Amendment Right To A Fair Trial, Which The Unfettered Peremptory Insures, Outweighs The Interests Of The Juror And The Community

Against the defendant's interest in peremptories, the petitioner and amicus curiae posit two competing concerns: the interest of the prospective juror under the Equal Protection Clause to be free of racial discrimination and the interest of the community to be assured that "justice" is done. Yet framing the issue this way assumes the very state action by the defense which is contested. The deeper question as to whether the defendant should in all fairness be deemed a state actor is a policy decision which can be restated in the following manner: does the juror's interest in serving on a particular petit jury override the criminal defendant's rejection of that juror out of subjective lack of faith and trust; and does the community's

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[12] If the juror continues to hold the government responsible for discriminatory strikes, that may be because the government, and not the defense, has excluded racial minorities from jury service for years. See infra at 54-56.

interest in taking a defendant's liberty, when that community has been polarized by racial conflict, outweigh the defendant's need to protect that liberty by striking certain jurors? The answer to both questions must be never, if the fundamental character of the jury trial system is to be preserved.

First, as suggested by this Court in Batson, 476 U.S. at 87 and Powers, 111 S. Ct. at 1370-74, a prospective juror's interest in being on a particular jury is linked to the defendant's interest in having him or her serve, because for both the integrity of the process is cast in doubt when the government excludes that juror on the basis of race. The defendant will in almost all cases "be a motivated, effective advocate for the excluded venire persons' rights" because, as this Court points out, "discrimination in the jury selection process may lead to the reversal of a conviction." Powers, 111 S. Ct. at 1372. Moreover, because the government has been and continues to be the party which frequently discriminates against racial minorities to secure a conviction,

see infra at 54-56, the defendant has an adversarial (and liberty) interest in scrutinizing the basis for the government's attack on any prospective juror who is a racial minority. See infra at 54-59.

In the rare case when those interests diverge, however, the juror's desire to serve must give way to the defendant's right to unfettered exercise of peremptories because the defendant's interest in the process is simply greater: the jurors are not on trial and are not at risk of losing their liberty or life. The distrust communicated to the excluded juror by one who essentially conveys: "I do not have confidence that you like me well enough to judge me fairly" pales when compared to the harm inflicted on the defendant whose right to a fair trial was impaired by his or her inability to give expression to this lack of trust. A Korean defendant would feel a deep sense of despair, for example, if an African American juror were allowed to serve who had, in voir dire, rolled her eyes upon being told that the defendant had struck an African American

patron in defense of his property or person. .That juror must be challenged even if otherwise qualified to serve because the defendant believes her to be psychologically "closed" to his persona and therefore predisposed to convict. "The purpose of the jury system," this Court held in Powers, "is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair." 111 S. Ct. at 1372. The defendant suffers the "real injury" if this confidence is undermined. Id.

Second, the community's interest in a fair trial should not be confused with what amounts to mob rule. The petitioner and several amicus curiae suggest that racial tension will erupt in cases involving a real or perceived charge of racially motivated conduct if this Court does not constrain the defendant's exercise of peremptories. See Brief of Petitioner at 13-14; Brief of the Criminal Justice Legal Foundation at 13-14; Brief of Charles Hynes at 4-5; Brief of the United States

at 23.[13] This argument appears to elevate the community's oftentimes unfounded desire to see a defendant jailed above the defendant's right to use peremptories to facilitate his or her constitutional entitlement to a fair trial, a threat which this Court must not appease. In the case of the Howard Beach incident in New York City, for example, the community belief underlying its desire to seat an African American on the jury was that the jury would be more likely to do what the community, without the benefit of trial, believed should result: convict the white defendants. It is a premise of trial by jury, however, that the "crowd" not be permitted to unleash its retributive fury on accused and powerless individuals. This Court has often balanced individual rights against society's interest, but this Court must never allow racial animus to tilt

[13] The petitioner and amicus curiae point to several state decisions, see e.g., People v. Kern, 75 N.Y. 2d 638, cert. denied, 111 S. Ct. 77 (1990); People v. Wheeler, 22 Cal. 3d 258 (1978), in which courts held that the defense could not make racially based peremptory challenges. These cases, however, rest on state constitutions, and do not appear to consider the arguments raised herein.

the balance in society's favor. The "crowd" should use the ballot box and not bomb the courthouse.

Trials have symbolic power. They can quickly become public events driven by intense conflicts that are often based on feelings and beliefs having little to do with the facts at hand.[14] That does not mean that the public and jury's perception of justice are always at odds. It does mean that this Court should be wary of making constitutional law based solely upon

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[14] A pointed recent example is the racial tension which erupted in New York City in September 1991 in the aftermath of a car accident which left a seven year old African American boy, Gavin Cato, dead. The driver of the car which hit the boy was Yosef Lifsh, who is a part of the Lubavitch Hasidic community in Brooklyn. The accident sparked several days of violence in the Brooklyn neighborhood, during which a young Jewish student from Australia was stabbed to death. Sixteen year old Yankel Rosenbaum, an African American, is charged with second degree murder and criminal possession of a weapon in connection with that event. The black community -- which includes American-born and Caribbean-born blacks in central Brooklyn -- made the prosecution of Mr. Lifsh a central demand in their demonstrations, although on September 5, 1991, a Brooklyn grand jury refused to return an indictment. Reverend Al Sharpton, who had led protest marches of blacks through the neighborhood, denounced the finding and called for renewed protests. See Andrew Yarrow, "Bid to Unseal Crown Heights Testimony Founders," N.Y. Times, Sept. 17, 1991, at B4; Steven Myers, "Judge Won't Open Records of Crown Heights Inquiry," N.Y. Times, Sept. 7, 1991, at 27; John Kifner, "Grand Jury Doesn't Indict Driver in Death of Boy in Crown Heights," N.Y. Times, Sept. 6, 1991, at 1.

"community" perceptions of what should happen at a criminal trial. The few nationally prominent examples of white defendants charged with acts of racial violence who attempt to strike African Americans from their juries present the Court with moving examples of the African American community's frustration over what appears to be a never-ending history of oppression. Although that frustration is valid, it cannot be alleviated by convicting white defendants, any more than executing whites can bring back African Americans lynched by white mobs in one of the most chilling historical examples of the jury system's failure. Justice should not use "revenge tragedy" as its model.

The community's interest in the outcome of a jury trial can only be as great as the government's interest in vindicating "justice." And yet the government and the accused are not symmetrically aligned in the criminal proceeding. The government, unlike the defendant, is not entitled under the Sixth Amendment to a fair trial or an impartial jury; those

fundamental rights are specifically vested in the accused to protect against the "awesome investigative and prosecutorial powers of the government." Williams v. Florida, 399 U.S. at 112. In fact, the government's responsibilities in a criminal prosecution ideally extend in some measure to the accused him or herself, a notion eloquently captured in a statement by this Court that the prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935).[15]

The case frequently invoked for the proposition that "between [the accused] and the state the scales are to be evenly held," Hayes v. Missouri, 120 U.S. 68, 70 (1887), can safely

[15] See also American Bar Association Standards Relating to the Administration of Criminal Justice, Standards 3-1.1(b) & (c) (2d ed. 1979) (prosecutor is both an administrator of justice and advocate whose duty is to seek justice, not merely to convict).

be characterized as a nineteenth century effort to undermine the Constitution's fair cross-section requirement. The petitioner, John Hayes, challenged on equal protection grounds the state's legislative determination that defendants in capital cases be afforded fifteen peremptories in cities with a population of more than 100,000 and eight in all other places. The Court upheld the distinction by noting that

> [e]xperience has shown that one of the most effective means to free the jurybox from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. . . . In our large cities there is such a mixed population, there is such a tendency of the criminal classes to resort to them, and such an unfortunate disposition on the part of business men to escape from jury duty, that it requires special care on the part of the government to secure there competent and impartial jurors.

Id. at 70, 71. The Hayes Court did not rule, as is sometimes suggested, that the government has any constitutional right to a fair trial. Rather, it acknowledged that although the accused

has a right to an impartial jury, the procedures by which juries were selected remained "matters of legislative discretion." Id. at 70. See Goldwasser, supra at 824-25.

When thrust into the fray of litigation, the government often strays from the ideal of securing "justice." In a recent argument before an en banc panel of the United States Court of Appeals for the Ninth Circuit, for example, the United States Attorney for San Diego, William Braniff, expressed some hesitation when pointedly asked by the panel whether he accepted the duty to pursue justice instead of a conviction. See Charles Bird, "Batson, U.S. Attorney's Belfry," San Diego Daily Transcript, Oct. 16, 1991, at 8A.[16] Batson, 476 U.S. 79, itself, and the years of government practice preceding Batson, see infra at 54-56, demonstrate that when left

[16] The case before the en banc panel, United States v. De Gross, 913 F.2d 1417 (9th Cir. 1990), reh'g granted (en banc), 930 F.2d 695 (9th Cir. 1991), presents the question, inter alia, of whether the Equal Protection Clause prohibits gender-based peremptory challenges by a criminal defendant. Argument took place on September 26, 1991, and the decision is pending.

unsupervised, the government will strike African Americans from venires, particularly in cases in which the defendant was also African American and the alleged victim white. See, e.g., Swain, 380 U.S. 202 (African American defendant charged with rape of white woman convicted by jury from which all African Americans had been struck). A Dallas County prosecutor even prepared a training book for new attorneys in the early 1970's in which he advised that prosecutors should not look for a "fair juror, but rather a strong biased and sometimes hypocritical individual who believes that Defendants are different from them in kind, rather than degree." The assumption that the prospective jurors would be white is clear from his second suggestion to avoid "any member of a minority group which may subject him to oppression--they almost always empathize with the accused." Van Dyke, supra at 152.

Batson has not eliminated the type of racial bias reflected in this comment. In a recent case, the government

challenged all of the African American women on the venire in a trial involving an African American male defendant whose only witness was an African American woman; the justification offered for three of the four strikes was that the women appeared to come from "questionable living circumstances" because one was a single mother and the other two were living with men to whom they were not married. United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991), petition for cert. filed, (Dec. 10, 1991) (No. 91-6664). These examples, both recent and historical, should warn racial minorities that their interests, like the interest of the "people" of which they are a part, is best served by the accused rather than the government. See Bandes, supra at 1046 (accused represents the "people" when vindicating rights enunciated under the Bill of Rights because these are the people's safeguard against government oppression).

III.

THE MINORITY DEFENDANT MUST BE PERMITTED TO USE PEREMPTORY CHALLENGES WITHOUT CONSTRAINT TO DIMINISH THE IMPACT OF RACISM ON HIS OR HER TRIAL

Criminal defendants are disproportionately members of racial minorities. Studies show that African Americans, Hispanics, Native Americans and other people of color comprise a disproportionate number of those arrested and imprisoned each year. See Developments, supra at 1495. For example, blacks[17] made up approximately 30 percent of the total arrested in 1988, although they represented only 12.3 percent of the United States population.[18] This disproportion is rooted in the racial stereotypes that influence police to arrest minorities more frequently than nonminorities, a process which

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[17] The term "black" appears to encompass divergent groups of black people living in the United States, including African Americans and such other constituencies as Caribbean-born immigrants.

[18] Moreover, as the recent case of the beating of Rodney King by Los Angeles police illustrates, racial minorities are much more likely than whites to be seriously injured in encounters with police officers. See Developments, supra at 1495.

itself generates statistically disparate arrest patterns justifying further selectivity. See Developments, supra at 1508. In addition, a disproportionate number of those criminal defendants tried before a jury are people of color.[19]

Racism pervades our system of criminal justice well after the arrest. Empirical studies demonstrate that racial minorities receive harsher treatment than do whites throughout the prosecutorial decision making process, from the initial decision as to what specific charges to file, to the decision in homicide cases as to whether to seek the death penalty. See Developments, supra 1520-29. These studies indicate that the probability of prosecution is greatest when the defendant is a racial minority and the victim is white, a result most strikingly

[19] Recent statistics show that black Americans comprise a disproportionate number of those convicted or acquitted after jury trial. In 1987, they made up 60.07% of the total number of people tried for all crimes in Manhattan, New York; 30.31% of the total in Portland, Oregon; 41.92% of the total in San Diego, California; 37.65% of the total in Seattle, Washington; and 97.06% of the total in Washington, D.C. See Dep't of Justice, The Prosecution of Felony Arrests, 1987 85-89 (1990). When compared with the 12% of the United States population which is black, these percentages demonstrate a gross disproportion.

confirmed in the well-known study performed by Baldus on the imposition of capital punishment in Georgia and presented to this Court in McCleskey v. Kemp, 481 U.S. 279 (1987). See Developments, supra at 1528-29.[20] Another recent study of federal sentencing under the Sentencing Guidelines reveals that African American men between the ages of eighteen and thirty-five will be required to serve significantly longer periods of time than either white or Hispanic men in the same age group. See Gerald W. Heaney, The Reality of Guideline Sentencing: No End to Disparity 28 Am. Crim. L. Rev. 161, 205-07 (1991).

Racial minorities are also grossly underrepresented on juries. See Developments, supra at 1558 (citing National Jury Project, Jurywork: Systematic Techniques § 5.01, at 5-2 (2d

[20] The Baldus study found that the prosecutor sought the death penalty Georgia in 70% of the cases involving an African American defendant and a white victim; 32% involving a white defendant and a white victim; 15% involving an African American defendant and victim; and 19% involving a white defendant and an African American victim. McCleskey, 107 S. Ct. at 1764.

ed. 1987)).[21] The harm of such underrepresentation falls squarely on the minority defendant because he or she is much more likely to be convicted when tried before an all-white jury than before a racially integrated one. Data and mock trial experiments provide overwhelming evidence that the all-white jury is not impartial when judging a defendant of color. See Developments, supra at 1559-60; Douglas L. Colbert, Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges 76 Cornell L. Rev. 1, 111-15 (1990). A scholar reported nine

[21] One important source of this underrepresentation is the use of voter lists for creating the master jury wheel from which the "qualified" wheel is formed (the list resulting after removing those who have exemptions, excuses or are otherwise disqualified). Figures indicate that a lower percentage of racial minorities register to vote than do whites. Even if a minority person is registered, however, he or she often must send in a questionnaire to be put on the "qualified" wheel. Because racial minorities are disproportionately poor and transient, they are more likely to fail to receive these questionnaires than are white people. See Developments, supra at 1561-66. In a recent case, a San Diego Superior Court judge found that people of Hispanic heritage who were eligible to serve on the grand jury (18 years and older) comprised 17.6% of the population in San Diego County. Yet, from 1986-1991, only 3.94% of all grand jurors were Hispanic. See People v. Williams, (San Diego County Superior Court, Case No. CR 119537) October 9, 1991 (unpublished).

mock jury studies in which white jurors' bias was reflected in higher conviction rates for African American or Hispanic as compared with white defendants. Id. at 111 n.550. When African American subjects were trial jurors, by contrast, they were more likely to give African-American defendants the benefit of the doubt in close cases. Id. at 112.[22] One study demonstrated that the presence of Hispanics on otherwise white juries managed to diffuse the pretrial racial animus expressed toward the Hispanic defendant. Id. at 113 & n.558. The notion that racism distorts white jurors' view of minority defendants occasionally surfaces in decisions challenging the impartiality of verdicts. In one Wisconsin case, for example, the juror remarked of an African American defendant, "Let's be logical, he's black, and he sees a seventeen year old white girl -- I know the type." State v. Shillcutt, 119 Wis. 2d 788, 791 (1984), quoted in Developments, supra at 1595 n.1.

[22] No studies appear to have focused on the possibility of bias among racial minorities, as for example, the way an African American juror would view an Hispanic defendant.

The government has exploited the attitude reflected by such comments for over one hundred years by attempting to remove racial minorities from juries. In case after case, culminating in Batson, this Court found that the government's efforts to strike minority jurors deprived defendants of the Constitution's guarantee of equal protection under the law. See, e.g., Strauder v. West Virginia, 100 U.S. 303 (1880) (West Virginia law excluded African Americans from jury duty); Neal v. Delaware, 103 U.S. 370 (provision in Delaware constitution excluded African Americans from voting and therefore from jury service); Norris v. Alabama, 294 U.S. 587 (1935) (evidence that no African American had served on jury in over one generation established prima facie case of purposeful state exclusion of African Americans from jury); Whitus v. Georgia, 385 U.S. 545 (1967) (jury commissioner practice of marking names of prospective jurors who were African American established prima facie case of purposeful state exclusion of African Americans from jury); see also

Carter v. Jury Comm'n, 396 U.S. 320 (1970) (civil action alleging discrimination on basis of race brought against state jury commissioners). Implicit in all of these decisions is the assumption that an all-white jury could not be fair to a minority defendant because its perspective would be distorted by race prejudice. Batson itself acknowledged the role of racial identity between the defendant and struck jurors in its requirement that both the defendant and the struck juror(s) be members of a "cognizable" racial group. Id. at 96. Although this Court relaxed that requirement in Powers by holding that a white man could establish an equal protection violation based upon the government's discriminatory strikes of minority jurors, it continued to emphasize that the government's behavior is especially suspeet when the defendant is also a minority by stating that

> Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the

> easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred.

111 S. Ct. at 1373-74 (emphasis added). See supra at 38-39.

The fact that it is the government, and not the defendant, using peremptory challenges to exclude racial minorities from the jury in cases involving minority defendants, see Developments, supra at 1565, strongly suggests that racial identity is in many cases the government's (hidden) explanation for "adoption of the forbidden stereotype." As one commentator said: "By abusing peremptory challenges, prosecutors ensure that the underrepresentation of minorities at the venire level is increased on the individual jury." Id. at 1566.

The prohibition against discriminatory strikes by the government helps to control the problem of racism on juries, but it is often not sufficient to counteract the very real possibility that racism will continue to infect the process. If a minority defendant believes that the jury was affected by racial

bias, he or she has no meaningful legal recourse: Rule 606(b) of the Federal Rules of Evidence and many corresponding state rules exclude juror testimony to impeach the verdict except in limited circumstances arguably not designed to ferret out race prejudice. Id. at 1595-98. Peremptory strikes by the defendant, and particularly the minority defendant, help to "even out" this potentially stacked deck. For when such a defendant strikes a white juror, he or she may diminish the impact of racism on the trial in two ways: first, by eliminating a person whom he or she reasonably believes harbors some degree of racial animus; and second, by maximizing the number of people of color on the jury. Such a strike is motivated not by racism, but race consciousness, and is akin to the state's use of racial categories to remedy the lingering effects of race discrimination. See, e.g., United States v. Paradise, 480 U.S. 149, 165 (1987) ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy

unlawful treatment of racial or ethnic groups subject to discrimination."); United Steelworkers v. Weber, 443 U.S. 193, 204 (1979) (Title VII cannot be interpreted to proscribe race-conscious affirmative action efforts to hasten the elimination of the vestiges of discrimination).[23]

For the State of Georgia here to don a "white hat" and suggest that criminal defendants discriminate against racial minorities is ironic indeed, in light of the overwhelming evidence that, for over one hundred years, the government has attempted to exclude minorities from juries to further its purpose of securing a conviction. This Court must not permit

[23] It is important to emphasize that because the defendant is not a state actor, he or she is not held to the standard set forth in those cases challenging affirmative action programs which arose under the Equal Protection Clause. See, e.g, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The example of affirmative action, however, helps to illustrate how race consciousness becomes permissible even when sanctioned or ordered by the state, if it is necessary to combat racism. And, if it is permissible for the state to take race into account at times, it is clearly permissible for the criminal defendant, who is a private actor, to take race into account to diminish the impact of racism on a trial at which he or she has so much to lose.

the State to invoke a social justice goal so cynically.[24] The historical backdrop of jury service demonstrates that: 1) the government must be scrutinized carefully in the exercise of its peremptories during a criminal trial, particularly when the defendant is part of a racial minority; and 2) the criminal defendant, who is in fact disproportionately a racial minority, must retain the freedom to use his or her peremptories in an unfettered manner -- even to the extent of sometimes making race conscious strikes.

CONCLUSION

The criminal defendant is involuntarily brought into litigation by an adversary which wields a fearsome investigative and enforcement power: the State. He or she may lose liberty and even life itself. Yet the Constitution, and

[24] It is especially ironic that the State of Georgia is protesting its concern for racial justice here when a few years before it was also before this Court on the claim that its criminal justice system sought and imposed the death penalty in a racially discriminatory manner. McCleskey, 107 S. Ct. 1756.

particularly the Bill of Rights, protects that defendant against abuses which prevail in places commonly understood to be police states, where accusations and convictions often collapse into a short but brutal end to life. At the vital center of those rights is the Sixth Amendment right to a jury trial. This Court must insure the continued integrity of the jury trial for the individual whom it was designed to protect -- the defendant -- by protecting the defendant's right to exercise his or her peremptory challenges without constraint. No defendant should be forced to trial with a jury whom he or she determines cannot be fair. No defendant, and particularly the defendant who is a racial minority, should be forced to explain how and why he or she senses danger in the group about to decide his or her fate.

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